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DUE PROCESS STANDARDS AND CONSIDERATIONS  
REGARDING SUSPENSION AND DEBARMENT

A Thesis  
Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, The United States Army, or any other governmental agency.

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DUE PROCESS STANDARDS AND CONSIDERATIONS  
REGARDING SUSPENSION AND DEBARMENT

by Captain Shawn T. Gallagher

ABSTRACT: This thesis sets out the regulatory provisions of the suspension and debarment provisions of the Federal Acquisition Regulations and explores their basis and development. The development of due process standards as applied to the suspension and debarment provisions are analyzed and a suggestion for a different focus in future judicial review is offered. This thesis concludes that the suspension and debarment provisions are an appropriate exercise of the government's contracting power and should be able to withstand future challenges if the provisions are appropriately applied.

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## INTRODUCTION

The concepts of suspension and debarment are, in the simplest analysis, methods by which the executive agencies of the federal government make blanket business decisions that they will not award future contracts to a particular firm or individual based on certain responsibility issues.<sup>1</sup> Over the past 60 years the methods by which the executive agencies of the government have made these decisions have undergone extensive evolution. Particularly in the last 30 years, the protections provided to contractors in the process by which suspension and debarment decisions are made have increased greatly. Some commentators, members of the bar, and contractors argue frequently and vociferously that various aspects of the process are improper. The criticisms range from reckless allegations that the entire process is unfair and unconstitutional to well-reasoned arguments why certain procedures should be changed to provide a little more due process.<sup>2</sup> The position of this thesis, however, is that the current regulatory provisions are appropriate and do provide adequate due process. This thesis will explore the historical development of the concepts of suspension and debarment and of due process considerations regarding suspension and debarment. Drawing on this analysis a refocusing of the standards by which the courts review suspension and debarment decisions will be proposed.

## SCOPE

Two distinct types of debarment actions exist, which are referred to as "inducement debarment" and "procurement debarment."<sup>3</sup> Inducement debarments are mandated or authorized by statute or executive order for the violation of that particular statute or order.<sup>4</sup> Inducement debarments reflect the government's use of the contracting process to achieve government policies having little or nothing to do with the buying of goods and services<sup>5</sup> and, consequently, are beyond the scope of this work. Procurement debarments, on the other hand, are formalized business judgments that business interests require the executive agencies of the government to refrain from contracting with a particular firm or person based on a lack of present responsibility.<sup>6</sup> It is the concept of the procurement debarments, along with the allied concepts of proposed debarment and suspension, which will be the focus of this thesis.

## SOURCE OF AUTHORITY

The concept of responsibility is the foundation upon which this authority to suspend and debar is based.<sup>7</sup> The requirement that the government contract only with "responsible bidders" was statutorily mandated for the military departments in 1948,<sup>8</sup> and for civilian agencies in 1949.<sup>9</sup> Congress evidenced its continued endorsement of the responsibility standard recently by enacting the Competition in Contracting Act

of 1984,<sup>10</sup> which requires awards of government contracts only to a "responsible source."<sup>11</sup> The concept of requiring government contractors to be responsible is, however, of much older vintage and has been described as "deeply imbedded in government contract law."<sup>12</sup>

As early as 1781, Robert Morris, as newly elected Superintendent of Finance for the Continental Army,<sup>13</sup> used the contracting process to supply food to troops in Philadelphia.<sup>14</sup> Morris required contractors to possess a degree of responsibility which was to be evidenced by their success in commercial pursuits.<sup>15</sup> While it appears that Morris never actually rejected a proposal based on this standard, presumably that was because only established merchants, well-known to Morris and his staff, actually submitted proposals.<sup>16</sup>

The courts have also noted the concept of responsibility, and have recognized that the concept means more than just financial ability; it also includes concepts of "judgment, skill, ability, capacity, and integrity."<sup>17</sup> Indeed, the Comptroller General, in commenting on the legislation that was to establish the responsible bidder standard for the military services in 1948, wrote the Chairman of the Senate Armed Services Committee that the provision relating to responsible bidders "contains little if any authority not now implied in section 3709 of the Revised Statutes, as amended."<sup>18</sup>

Today, the Federal Acquisition Regulation (FAR) specifically sets out the broad scope of the concept of responsibility.<sup>19</sup> Furthermore, the FAR requires that



"an affirmative determination of responsibility" be made before each award and that "[i]n the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility.<sup>20</sup>" Each responsibility decision looks to the requirements of the particular contract and measures them against the perceived ability of the prospective contractor to satisfactorily perform those requirements. Other factors may be imposed by statute or regulation,<sup>21</sup> but if the prospective contractor cannot meet that initial hurdle, then the inquiry ends<sup>22</sup> and the contractor is not eligible to receive that particular contract because he is not responsible.

While the authority for debarment and suspension arises from the concept of responsibility, there are marked differences between responsibility determinations and suspension or debarment decisions. The contracting officer makes responsibility decisions, while suspension and debarment decisions are made at a much higher level.<sup>23</sup> Suspension and debarment decisions are binding on all executive agencies of the United States government<sup>24</sup> and are conclusive for their duration as to all procurements by those agencies.<sup>25</sup> Debarment and suspension decisions are based only on responsibility issues,<sup>26</sup> but of the factors considered in determining if a contractor is responsible only two are directly considered in the suspension and debarment area.<sup>27</sup> Those factors are that a contractor have a satisfactory record of performance<sup>28</sup> and that it have a satisfactory record of integrity and business ethics.<sup>29</sup>

The analysis of present responsibility for the purpose of deciding whether to impose a suspension or debarment has resulted in the development of a relatively sophisticated process. This process attempts to balance the interests of the government and the contractor in order to arrive at a business decision regarding whether a particular contractor is a trustworthy business associate.

## CURRENT STANDARDS AND DUE PROCESS

### GENERAL SCHEME

The present policies and procedures regarding suspension and debarment applicable to the federal government are contained in FAR subpart 9.4.<sup>30</sup> Within the Department of Defense (DOD) these procedures have been supplemented in the DOD FAR Supplement (DFARS) subpart 9.4,<sup>31</sup> which have been further supplemented within the Army by the Army FAR Supplement (AFARS) subpart 9.4.<sup>32</sup> General policies and procedures are generally established by the FAR. The DFARS contain some general policies and uniform procedures applicable only within DOD, while the AFARS contain what arguably are only implementing procedures and no policy.<sup>33</sup>

The regulatory scheme of the FAR provides for four distinct classifications of contractors prohibited from contracting with the government. One classification, "ineligible" contractor, is the "inducement debarment" discussed earlier. An ineligible contractor is defined as "excluded from Government contracting . . . pursuant

to statutory, Executive order, or regulatory authority [other than the FAR and its supplements] . . . .<sup>34</sup>" One clear advantage of the FAR's use of the term ineligible contractor is that it avoids the possibility of contracting personnel mixing the concepts of "inducement" and "procurement" debarments.

The three other classifications are all aspects of the process by which the executive agencies of the government decide if a contractor has the requisite responsibility to contract with those agencies and are means by which the government protects itself while those decisions are being made. Two of those classifications, suspension and proposed debarment, are preliminary steps in that process. In either case the government action has a direct and potentially drastic<sup>35</sup> effect upon the contractor by curtailing or ending the contractor's ability to contract with the executive agencies of the government. Each action reflects the government's attempt to balance competing interests at different stages in the process. The government's interests include contracting only with responsible contractors, protecting public funds, and not impeding any investigation or prosecution. The contractor's interests include due process concerns and notions of fair play. The final classification, debarment, reflects the finalized business decision of the government that a contractor is not presently responsible and may not contract with executive agencies of the government for a specified time.

The debarment process may start with a suspension or a proposed debarment. If the process starts with a

suspension, it will always be followed by a decision to terminate the suspension or to propose the contractor's debarment. If the process starts with a contractor's proposed debarment or if it proceeds from suspension to proposed debarment, it will always be followed by a decision to terminate the previous actions or to debar the contractor.

The effects of a suspension, proposed debarment, and debarment are virtually the same in scope. Bids may not be solicited from such contractors, options and contract extensions will not be exercised, such contractors will not be approved as subcontractors, and contracts will not be awarded to them.<sup>36</sup> One minimal difference is that a suspended or debarred contractor may not represent or act as an agent of another contractor, while there is no such prohibition on a contractor who is proposed for debarment.<sup>37</sup> A much greater difference is that suspensions and debarments are effective throughout the executive agencies, while a contractor proposed for debarment is restricted in his contractual relations only with the agency that proposed the debarment.<sup>38</sup> A contractor who was suspended and is then proposed for debarment will remain suspended while his proposed debarment is being processed. Therefore, he will remain restricted in his contractual relations throughout the executive agencies of the government and may not represent or act as an agent of another contractor.<sup>39</sup>

## SUSPENSION AND DEBARMENT STANDARDS

A suspension action is the earliest possible step in the process that will have a direct effect on a contractor. It is "a serious action" to be taken when "immediate action is necessary to protect the Government's interests.<sup>40</sup>" It is also a temporary action "pending the completion of investigation and any ensuing legal proceedings . . . .<sup>41</sup>" The action is authorized based on suspicion, supported by adequate evidence,<sup>42</sup> of certain types of behavior. The types of behavior that may serve as a basis to suspend a contractor are certain types of crimes<sup>43</sup> or "[a]ny other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor.<sup>44</sup>" Adequate evidence is defined as "information sufficient to support the reasonable belief that a particular act or omission has occurred.<sup>45</sup>" Therefore, a contractor may be suspended when an agency has sufficient evidence to support the reasonable belief that the contractor is involved in either a particular type of crime or other activities which affect responsibility. The FAR further provides that indictment for any of the types of crimes for which a contractor may be suspended is adequate evidence to effect a suspension.<sup>46</sup> The suspension is "for a temporary period pending the completion of investigation and any ensuing legal proceeding,<sup>47</sup>" but may not exceed a maximum of 18 months unless legal proceedings have begun within that time.<sup>48</sup>

A proposed debarment may be the first step in the process or it may follow a suspension. A contractor may be proposed for debarment based on: criminal convictions or civil judgment for certain types of crimes,<sup>49</sup> contract performance issues,<sup>50</sup> or for "[a]ny other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor."<sup>51</sup> If the proposed debarment is based on anything other than a conviction or civil judgment, the cause for debarment must be established by a preponderance of the evidence.<sup>52</sup>

Assuming that the suspension and proposed debarment are not terminated, the final decision that a contractor is not presently responsible results in his debarment. The period of debarment is to be "commensurate with the seriousness of the cause(s). Generally . . . [it is] not [to] exceed 3 years."<sup>53</sup> Also, any period of time that the contractor was suspended should be considered in arriving at the length of the debarment period.<sup>54</sup>

Suspension and debarment are to be "imposed only in the public interest for the Government's protection and not for purposes of punishment."<sup>55</sup> The FAR makes a special point that "[t]he existence of a cause for debarment . . . does not necessarily require that the contractor be debarred . . . ."<sup>56</sup> Because the issues are present responsibility and protection of the government, the debarring official must look to the seriousness of the cause and any mitigating factors.<sup>57</sup>

## DUE PROCESS CONSIDERATIONS

The FAR provides that agencies will develop their own procedures regarding the process by which debarment and suspension decisions are made.<sup>58</sup> The procedures are to be "as informal as practicable, consistent with principles of fundamental fairness."<sup>59</sup> At a minimum, the FAR requires notice of the suspension or proposed debarment and an opportunity for the contractor to provide information and argument in opposition; such presentations may be written, in person, or through representation.<sup>60</sup> The suspension or proposed debarment notice must describe, "in terms sufficient to put the contractor on notice," the basis for the action.<sup>61</sup> Suspension notices are to do this "without disclosing the Government's evidence . . . ."<sup>62</sup> The AFARS provides that "[c]ontractors routinely will be furnished a copy of the entire record which formed the basis for the decision" by the debarring or suspending official.<sup>63</sup> The AFARS further provides that if there is a reason for withholding any part of the record, then "the contractor will be informed of what is withheld and the reasons for such withholding."<sup>64</sup> In actions based on an indictment, conviction, or judgment, including a conviction based on a plea of nolo contendere,<sup>65</sup> the basis of the action is not open to discussion.<sup>66</sup> As a result, opposition to such actions should focus on the present responsibility of the contractor. If the suspension or debarment is fact-based, then the contractor may wish to focus on the

facts of the alleged impropriety as well as his present responsibility.

The FAR sets out two types of presentation rights for the contractor. Every contractor is to be provided an opportunity to present matters in opposition to the proposed debarment or suspension. If that presentation "raises a genuine dispute over facts material" to the action, the contractor will be provided a fact-finding proceeding, in which the contractor will be given "an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents . . . ."<sup>67</sup> An exception to the requirement for a fact-finding proceeding is allowed in the case of a suspension when a determination is made, with the advice of the Department of Justice (DOJ), that "substantial interests of the Government in pending or contemplated legal proceedings would be prejudiced . . . ."<sup>68</sup>

The exact nature of the contractor's presentation rights depend on the rules of the agency proposing the debarment or imposing the suspension.<sup>69</sup> In the Army, the opposition presentation is made to the suspension and debarment authority and is termed a presentation of matters in opposition.<sup>70</sup> The contractor is given 30 days from receipt of notice to submit matters in opposition; if an oral presentation is requested the Army must schedule it within ten working days of the date requested.<sup>71</sup> Verbatim transcripts of the oral presentations are made,<sup>72</sup> and the present practice is to provide a free copy to the contractor. These meetings are non-adversarial<sup>73</sup> and are an opportunity



for the contractor to present any information it desires. Typically, the Army relies on the administrative record on which the suspension or proposed debarment was based. The Army representative will usually supplement this record only when other information in the government's possession contradicts the contractor's oral or written submissions.<sup>74</sup> In the Army, fact-finding presentations are to be held before a military judge appointed by the suspending or debarring authority.<sup>75</sup> The large majority of past cases have resulted in a presentation of matters in opposition, but only two cases have utilized the fact-finding procedure.<sup>76</sup>

#### DEVELOPMENT OF SUSPENSION AND DEBARMENT STANDARDS AND DUE PROCESS

##### EARLY DEVELOPMENTS

The concept of keeping lists of contractors with whom the government will not do business is probably not unique to the twentieth century,<sup>77</sup> but evidence of the practice only exists after World War I. The oldest published opinion by the Comptroller General regarding debarment appears in 1928.<sup>78</sup> The opinion indicates what can only be called a grudging acceptance of the idea of debarment. The Comptroller General stated that "[a]s a general rule there is no authority for the debarment of bidders" and that generally the required bond should protect the interests of the United States.<sup>79</sup> He then went on to say that:

[w]hen the interests of the United States require the debarment of a bidder no question will be raised by this office with respect thereto, provided that the length of time of such debarment is definitely stated and not unreasonable, and the reasons for the debarment, with a statement of the specific instances of the bidder's dereliction, are made of record and a copy thereof furnished the bidder and this office. Such should be the procedure with respect to the debarment of bidders hereafter.<sup>80</sup>

In 1929, the Secretary of War proposed the permanent debarment of a contractor. The proposal was based, at least in part, on an opinion of the Judge Advocate General that the Secretary, "in the exercise of the supervisory authority vested in him by law,<sup>81</sup>" could issue instructions by which the contractor could be presumed nonresponsible until evidence rebutting the presumption was received.<sup>82</sup> The Comptroller General agreed with the Judge Advocate General's opinion, but went on to state that such authority did not allow for the permanent debarment of a contractor. Quoting an earlier opinion to the Secretary of the Navy, the Comptroller General stated, "[t]here is no authority under the provisions of . . . section 3709, Revised Statutes . . . , for the debarment of bidders or the issuance of a debarred bidder's list.<sup>83</sup>" The Comptroller General then said that while there was no authority to debar a bidder permanently, there was authority "to refuse to accept a bid of an unsatisfac-

tory contractor who has attempted fraud on the Government until, as stated by the Army Judge Advocate General, 'receipt of evidence tending to rebut the presumption of lack of responsibility . . . .'<sup>84</sup>" Subsequent opinions regarding debarment actions in the 1930's continued the requirements set out in the 1927 opinion, emphasizing that the length of the debarment must be specifically stated and be reasonable.<sup>85</sup>

By 1933, Congress moved into the inducement debarment business by enacting the Buy American Act,<sup>86</sup> which provided that contractors who violated certain provisions of the act would not be awarded new government contracts for the construction, repair, or alteration of public buildings or works.<sup>87</sup> In 1935, Congress amended the Davis-Bacon Act<sup>88</sup> to provide that contractors determined to have violated provisions of that act would not be awarded government contracts for three years.<sup>89</sup> Finally, in 1936, Congress enacted the Walsh-Healey Act,<sup>90</sup> which provided that contractors determined to have breached provisions of the act or falsified representations required by the act would not receive government contracts for three years.<sup>91</sup>

The first reported study commenting on the use of debarment, albeit inducement debarment, was a 1939 survey by the Attorney General's Committee on Administrative Procedure.<sup>92</sup> Citation to the monograph by later commentators leaves the impression that the committee believed that debarring a contractor was improper because the consequences of the action were so drastic.<sup>93</sup> This is an incorrect perception. The committee studied the administrative procedures and

practices of thirteen government agencies, one of which was the Division of Public Contracts, Department of Labor, which was established pursuant to the three year old Walsh-Healey Act.<sup>94</sup> In setting up the study of the Division of Public Contracts, the committee noted that the Walsh-Healey Act provided for no criminal sanctions. Instead, the punishments were either civil actions for liquidated damages, procurement costs, and recovery of the amount of underpaid wages; or the "dire sanction" that no government contract was to be awarded for three years to a contractor found to have violated the act.<sup>95</sup>

Because the administrative procedures of the Division of Public Contracts were so intertwined with the enforcement of the Walsh-Healey Act, the committee outlined and discussed the relevant provisions of the act. The committee's concern was that the law was not being:

adequately implemented, for, on the one hand, the only penalty for violation is that restitution be made, an extremely light club with which to compel obedience to the congressional command; while, on the other hand, the penalty of blacklisting is so severe that its imposition may destroy a going business and, with it, the employment opportunities of those whom the statute was intended to benefit.<sup>96</sup>

The committee clearly did not find the use of debarment to be inherently distasteful; rather, it wanted the law amended to provide for an intermediate sanction that

allowed "the present blacklisting provision to be reserved for only the extreme cases."<sup>97</sup> This conclusion finds support in the committee's lack of negative comment on the ineligibility provisions of the "regular dealer" or "manufacturer" requirements of the Walsh-Healey Act. This was possibly based, at least in part, on the committee's observation that this ineligibility lasted only until the firm could affirmatively show a change in its status.<sup>98</sup>

#### EARLY REGULATORY DEVELOPMENT

The Code of Federal Regulations (CFR) was first published in 1939, and contained regulations current as of June 1, 1938.<sup>99</sup> Procurement regulations were published by both the Army and the Navy, but other than references to statutory provisions relating to regular dealers and manufacturers,<sup>100</sup> they contained no provisions relating to the debarment of contractors.<sup>101</sup>

By 1941, the Army procurement regulation provided, under a section entitled "Rejection of Bids," that "[t]he lowest bid . . . may be rejected . . . if . . . [t]he bidder is at the time on the 'Confidential List of Bidders to Whom Awards Will Not Be Made', (sic) as published by The Adjutant General."<sup>102</sup> No other information appears, however, so it is difficult to tell whether the Army had initiated or was publicly recognizing a list of its internal debarments, whether it was producing an internal list regarding inducement debarments arising out of the 1930's legislation, or whether the list was a combination of the two. As no

other basis is given for the rejection of a bid, including the statutorily based debarments of the Buy American Act, Davis-Bacon Act, or Walsh-Healey Act, it is possible the list was an internal list of the inducement debarments. However, next years version of the Army regulation supports the conclusion that this list was a list of bidders debarred pursuant to the Army's procurement authority.<sup>103</sup>

The 1943 version of the Army procurement regulations used the term debarred for the first time. Under a section entitled "Debarred bidders," the regulation recognized four lists of debarred bidders.<sup>104</sup> The regulation noted a list for violation of the Walsh-Healey Act, a list for violation of the Davis-Bacon Act, a "War Department list of bidders to whom awards will not be made,<sup>105</sup>" and a State Department list of "blocked nationals" judged to be aiding the enemy. Only two grounds were provided for inclusion on the War Department list. One was for "fraud or attempted fraud against the United States . . . ,<sup>106</sup>" and the other was, "for the duration of the war, in any instance where the Director, Purchases Division, determines that the best interests of the United States require . . . [it].<sup>107</sup>" Some due process was recognized in that the regulation provided for notice, "in reasonable detail," and an opportunity to provide a written statement regarding the complaint, but provided that no "evidence in the hands of the War Department, except in the notice," would be given to the contractor.<sup>108</sup> The regulation met the 1928 standards announced by the Comptroller General,<sup>109</sup> except that no rule appeared

regarding the length of a debarment. This shortcoming would not be crucial, however, as long as any debarment imposed was limited in duration.

From 1943 through 1945, only minor technical changes occurred in the pertinent portions of the regulation. In 1946, the section was renumbered and retitled "Disqualified bidders.<sup>110</sup>" The regulation also removed the qualification "for the duration of the war . . .<sup>111</sup>" The regulation then provided that "in any instance where the Director, Procurement Division, determines that the best interests of the United States require<sup>112</sup>" a contractor could be added to the "Confidential List of Bidders to Whom Awards Will Not Be Made.<sup>113</sup>"

In 1947, the provision relating to notice and an opportunity to submit matters in opposition to the debarment was removed from the Army regulation.<sup>114</sup> Assuming that the Army was still abiding by the 1928 Comptroller General opinion, the Army would continue to provide notice of the debarment, but now had no obligation to accept any opposition. However, no evidence of the practice under this regulation exists.

DOD was established in 1947, and regulations pertaining to DOD were promulgated under title 32 of the Code of Federal Regulations. No DOD regulations pertaining to procurement were published in 1947. The Navy, however, did publish extensive procurement regulations for the first time since 1938. The Navy procurement regulation included a section titled "Ineligible contractors,<sup>115</sup>" pursuant to which the Navy maintained a "List of Ineligible Contractors.<sup>116</sup>" The

Navy list was to incorporate lists of violators of the Walsh-Healey Act and the Davis-Bacon Act.<sup>117</sup> The list was to further include "[c]ontractors who have defaulted on, or who have violated security regulations with respect to, contracts with any one or more of the Bureaus, or have been determined to be guilty of fraud or attempted fraud against the Government."<sup>118</sup> The regulation contained no notice provision to contractors. This was the last detailed Navy procurement regulation published in the CFR, as the Navy evidently decided to manage its procurement activities through naval directives unpublished in the CFR.

The first Armed Services Procurement Regulation (ASPR) appeared in the 1949 edition of the CFR.<sup>119</sup> The ASPR provided, in a section entitled "Ineligible contractors and disqualified bidders," that each Department would, according to its own procedures, maintain its own list of such entities.<sup>120</sup> The ASPR required that each list include the statutorily directed lists and "[c]ontractors who have been disqualified or declared ineligible in accordance with the procedures prescribed by each respective Department."<sup>121</sup> It further required that each military department exchange their lists and keep the lists updated,<sup>122</sup> but there was no requirement that the departments honor each other's lists. How contractors were added to or deleted from such lists was left up to the respective military departments.<sup>123</sup>

On October 1, 1950, the Air Force entered the picture with its procurement procedures.<sup>124</sup> These were the most detailed provisions yet published regarding



"[i]neligible contractors and disqualified bidders.<sup>125</sup>" The Air Force required that a contractor would be "disqualified" (debarred) and listed "only after receipt of definite evidence showing that the acts of the person or firm constituted a fraud or attempted fraud against the United States.<sup>126</sup>" The regulation stated that "disqualification" (debarment) was a "drastic action" and had to be based on "evidence rather than accusation.<sup>127</sup>" Furthermore, the notion that the action was being taken "for the purpose of protecting the Government and not for punishment" was first codified within this regulation.<sup>128</sup>

The Air Force also codified, for the first time, the term "suspended."<sup>129</sup> Procedures regarding suspended contractors were not as clear as for "disqualified" parties, but the policy was that procurements would "not be made from, or commitments given to, firms suspected of fraud against the Government . . . .<sup>130</sup>" While the Air Force had imposed a stricter standard than the Army in order to "disqualify" (debar) a contractor, they had retained a method by which to handle suspected impropriety by creating the suspension provisions which allowed action to be taken based on suspicion.

#### EARLY EMERGENCE OF PRESENT STANDARDS

On May 5, 1951, the Army's revised procurement procedures regarding suspension and debarment were published.<sup>131</sup> Three classifications, still reflected in the FAR, were established: disqualified contrac-

tors, determined to be in violation of the Walsh-Healey Act, Davis-Bacon Act, or Buy American Act;<sup>132</sup> suspended contractors, suspected of fraud and criminal conduct;<sup>133</sup> and contractors debarred for "acts constituting fraud or attempted fraud against the United States or deliberate and gross violations of contract provisions . . . ."<sup>134</sup>

Suspensions were treated at length as to reports and responsibilities, but the only regulatory standard for taking the action was "allegations or suspicions of fraud and criminal conduct . . . ."<sup>135</sup> No notice provisions were provided in the case of a suspension, although the regulation mandated that "[n]o additional procurement will be made from, nor any commitments of any nature given to" a suspended contractor.<sup>136</sup> The regulation did, however, allow for the award of contracts to suspended bidders if approved by the suspending official, stating that "[b]ids from suspended contractors will not be automatically rejected by Contracting Officers solely because of the suspension."<sup>137</sup> If a contractor became suspicious that his relationship with the government had changed, contracting personnel were "prohibited" from releasing any information "by reference or detail" about the suspension.<sup>138</sup> The contractor was to be told that "consideration is being given to his contract, or contractual relationship, by the Office of the Under Secretary of the Army," and that he should address any questions, in writing, to the Litigation Division of The Judge Advocate General's Office.<sup>139</sup>

Debarments were to "be based on adequate evidence rather than on allegation or accusation.<sup>140</sup>" No notice provision was explicitly provided in the regulation, but a portion of the seminal Comptroller General's opinion,<sup>141</sup> which required the contractor be notified of debarment and the reasons for the action, was quoted within the regulation.<sup>142</sup>

A brief insight into the use of the suspension procedure under this regulation is afforded by the testimony of Army representatives before a Senate subcommittee in 1953.<sup>143</sup> In 1951, an officer of Joseph Weidenhoff, Incorporated, gave a watch to an Army civilian employee who was head of the evaluation group at an Army Depot.<sup>144</sup> An investigation ensued, and on November 1, 1951, the firm was suspended.<sup>145</sup> The suspension was modified on February 20, 1952, based on a perceived need for the firm's equipment.<sup>146</sup> Before this modification was made, however, the Army obtained a written agreement from the firm that any administrative action taken by the Army, or the award of any contracts to the firm, "would not be construed as absolving the corporation or any of its officials, agents, or employees from any criminal or civil action, and would not adversely affect the rights of the United States Government in any amount.<sup>147</sup>" The investigation by the Department of Justice, however, resulted in no prosecution after the grand jury declined to indict anyone.<sup>148</sup>

In 1952, the only consequential change in the Army's suspension and debarment procedures was the designation of an Assistant Judge Advocate General as

the person responsible for making suspension and debarment decisions, duties still incumbent upon the position, and maintaining the consolidated list of such contractors.<sup>149</sup> Previously, such responsibilities were in technical contracting channels. One other change of note was a strengthened provision about communications with suspended contractors. The regulation not only prohibited releasing information "by reference or detail" about the suspension, but also prohibited releasing "the fact that the contractor has been suspended" by anyone other than the office of the Assistant Judge Advocate General.<sup>150</sup>

Between 1949 and 1953, DOD made no changes in the ASPR provisions relating to ineligible contractors. But on May 2, 1953, notice was published that the existing provisions were withdrawn and a new subpart, "Debarment of Bidders," was being added to the ASPR.<sup>151</sup> This new subpart was amended on August 22, 1953, to include the concept of suspension.<sup>152</sup> The new ASPR provisions, now entitled "Debarred, Ineligible, and Suspended Bidders," changed the role of the ASPR in this field from loose oversight to extremely centralized control. Furthermore, many of the standards established in this version of the ASPR can be seen as direct precursors to the present FAR provisions. Interestingly enough, the Comptroller General claimed some credit for the promulgation of the new regulations.<sup>153</sup>

The ASPR provided for debarment for a conviction or judgment, by a court of competent jurisdiction, for a fraud or criminal offense incident to obtaining,

attempting to obtain, or performing a contract, or for violation of federal antitrust statutes in submitting bids or proposals.<sup>154</sup> The regulation went to great lengths to indicate that convictions did not mandate debarment, and listed several mitigating factors to be considered.<sup>155</sup> Also, the regulation contained a provision that if a contractor had the conviction or judgment upon which his debarment was based overturned, the debarment would be removed at the request of the contractor.<sup>156</sup> Debarment was also appropriate if "clear and convincing" evidence existed of certain contract violations, assuming that the specific incidents were considered serious enough to warrant debarment.<sup>157</sup> These contract violations were: deliberate failure to deliver conforming goods,<sup>158</sup> deliberate failure to meet delivery schedules,<sup>159</sup> "a history of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts,<sup>160</sup>" failure to abide by contingent fee clauses,<sup>161</sup> and failure to honor gratuity clauses.<sup>162</sup>

The ASPR provided that debarments had to be for reasonable periods, generally not to exceed five years for convictions and three years for other grounds, with credit given for any period during which the contractor was suspended.<sup>163</sup> Notice of debarment was to be provided to the contractor within 30 days of the decision, giving specific reasons for the debarment and providing the contractor with an opportunity to present evidence on his behalf.<sup>164</sup> Copies of debarment actions taken by the services were to be provided to the

Comptroller General,<sup>165</sup> and the General Services Administration (GSA).<sup>166</sup>

The ASPR provisions on suspension stated that it was "a drastic action which must be based upon adequate evidence rather than mere accusation."<sup>167</sup> The action was to be taken "for the purpose of protecting the interest of the Government and not for punishment."<sup>168</sup> Approved reasons for the action were suspicion of fraud "or a criminal offense in obtaining, attempting to obtain, or in the performance of a contract."<sup>169</sup> The ASPR adopted the Army and Air Force position that suspended contractors should not be informed of the suspension action and that inquiries about such matters should be handled as each military branch directed.<sup>170</sup>

A final ASPR provision adopted that year, which can also be found in the present FAR, provided that where the government had an approval right on subcontracts, contracting officers should disapprove subcontracts with contractors on the consolidated list.<sup>171</sup>

As a result of the extended ASPR coverage in the area, the Army procedures were greatly modified to be less involved in establishing policies and standards. However, they continued their role of informing Army personnel of what was to be contained in reports, where they were to go, how many copies were required, and who was responsible for various actions.<sup>172</sup> One new area in the Army procedures that forecast a concern of the future was a provision on affiliates. The Army procedures noted that some contractors were attempting to evade the consequences of suspensions or debarments

by setting up new firms or by otherwise using affiliated-firms. The procedures therefore required that if contracting personnel "reasonably established" that this was occurring, then those firms would be treated as suspended or debarred, with a report to follow. "Doubtful cases" were to be referred by report for decision by the suspending and debarring official.<sup>173</sup> The report on contractors being recommended for suspension or debarment also required, for the first time, any known information on affiliates.<sup>174</sup>

In 1954, the only change of note in the suspension and debarment provisions of the ASPR was that a suspension or debarment by one military service was made applicable to all of DOD.<sup>175</sup> Notice provisions relating to debarred contractors were also amended so that when a contractor was notified of his debarment it was clear he was debarred throughout DOD.<sup>176</sup>

#### CONGRESSIONAL INVOLVEMENT

In 1954, the first evidence of congressional scrutiny of the suspension and debarment procedures occurred. A subcommittee of the House Armed Services Committee investigated allegations of fraud in the construction of an ordnance facility in the Panama Canal Zone. In 1953, United Enterprises, Incorporated, (United) submitted a bid on the project which arrived late; the issue was whether the bid could nevertheless be accepted because of an exception allowed for late bids due to mishandling by the mail system.<sup>177</sup> The U.S. Army Corps of Engineers conducted a series of

apparently inept investigations which resulted in the suspicion that United had attempted to commit a fraud in the bidding of the contract.<sup>178</sup> This resulted in a report, pursuant to the ASPR, that United was suspected of fraud.<sup>179</sup> It is unclear from the subcommittee report whether United was ever suspended, but the Chief Counsel of the Corps of Engineers, and the subcommittee because it adopted that Counsel's view, believed that the report, "to all intents and purposes, blacklisted" United.<sup>180</sup> The subcommittee recommended "that the regulations for determining suspicion of fraud charges made against bidders (who thereupon are blacklisted) should be revised to accord the decency of public charge and trial and prompt resolution of the controversy in the American tradition of fair and open dealings."<sup>181</sup> While the subcommittee recommended a change in the suspension regulation, the nature of the recommended change indicates a disagreement with the methods, but not the policy.

The subcommittee report was approved on June 25, 1954,<sup>182</sup> but evidently it caused very little concern among those responsible for the regulation because no changes in the suspension procedures occurred in 1954 or 1955. Congressmen on the subcommittee noted this fact and in June and July, 1956, the subcommittee for Special Investigations, House Armed Services Committee, which was made up of mostly the same congressmen, held hearings on sections of the ASPR, to include section 1-605 on suspensions.<sup>183</sup>

The subcommittee criticized the suspension provisions of the ASPR that kept the fact of the



suspension from the suspended contractor. Among other comments on the provision, the chairman of the subcommittee stated, "it is one of the most highhanded and unfair practices that has come to the attention of the committee."<sup>184</sup> When the DOD witness confirmed that the ASPR provided that a suspended contractor would not be informed of the suspension Congressman Hess stated, "[y]ou are getting as bad as Russia."<sup>185</sup>

Moreover, the subcommittee's figures showed relatively liberal use of the provision. During part of 1954-1955, the Navy had 11 cases in which they suspended 15 firms and individuals; the Air Force had 27 cases in which they suspended 68 firms and individuals; and the Army had 56 cases in which they suspended 172 firms, individuals, and affiliates.<sup>186</sup> The committee discussed many aspects of suspension, but it is clear that the committee's main concern was that a contractor should be notified when he was suspended.<sup>187</sup> Testimony indicated that the reason for the lack of notice was concern by the DOJ about alerting a suspect to an investigation.<sup>188</sup> Based on the results of the first day of the hearing, however, DOD witnesses returned to the hearing a month later with a change in policy. DOJ and DOD agreed that suspended contractors would be notified of their suspension within 10 days of the suspension.<sup>189</sup> The notice would not provide any facts upon which the suspension was based, but only "that the suspension is based on information that the firm or individual has committed irregularities of a serious nature . . . ."<sup>190</sup> The contractor would also be notified that the suspension was effective

throughout DOD and was "for a temporary period pending the completion of an investigation and such legal proceedings as may ensue . . . .<sup>191</sup>" The regulation prohibited the release of any information regarding the nature of the irregularities upon which the suspension was based,<sup>192</sup> but the regulatory changes satisfied the subcommittee's concerns.<sup>193</sup>

Scandals in the military procurement of uniform items led to a series of investigations by Congress during 1955-1957. These investigations clearly endorse the use of suspensions and debarments by the military, but were critical of the way in which suspensions and debarments could be evaded.

The first report was printed in 1956,<sup>194</sup> and involved hearings in 1955 on several contracts for the production of Army and Navy caps. The report stated that three individuals, including Sol Schlesinger (Schlesinger), had "forfeited any right to engage in future business with the Government."<sup>195</sup> The report noted that as a result of the investigation nine firms and three individuals had been suspended and Schlesinger and his firm, Ideal Uniform Cap Company (Ideal), had been debarred.<sup>196</sup>

The debarment of Schlesinger and Ideal is the font of several subsequent developments of importance and deserves further exploration. The Navy debarred Schlesinger and Ideal on July 14, 1955.<sup>197</sup> The Navy based its debarment decision on two grounds: the default of Ideal on one contract and Schlesinger's testimony at congressional hearings.<sup>198</sup> Schlesinger's records were subpoenaed by Congress, but he refused to

provide the records and made liberal use of his fifth amendment right not to incriminate himself during the hearings.<sup>199</sup> This conduct was not a recognized basis for debarment under the ASPR, but the Navy utilized the ASPR deviations clause to make the conduct a basis for this debarment.<sup>200</sup> The Navy admitted that the congressional testimony "triggered" the debarment action,<sup>201</sup> and it appears clear that the defaulted contract was thrown in the notice solely as an added factor, or as insurance, because a "history of failure to perform . . . in accordance with the terms of one or more contracts" was specifically provided as a basis for debarment under the ASPR.<sup>202</sup> Schlesinger's protests to the Comptroller General resulted in an inquiry by the Comptroller General to the Navy, but eventually the debarment decision was upheld.<sup>203</sup>

Finally, Schlesinger v. Gates,<sup>204</sup> decided in 1957, was the first court case to directly address the validity of procurement debarments. Prior to this time, and for some time thereafter, the courts did not address these types of issues based upon a lack of standing by the individual or firm.<sup>205</sup> The Schlesinger court sidestepped the issue of standing, however, assuming "without so deciding" that there was standing,<sup>206</sup> and then sustained the debarment. The court found authority for the debarment in the responsible bidder requirement of the Armed Services Procurement Act of 1947, and the implementing provisions of the ASPR.<sup>207</sup> The court then found that the ASPR provided for debarment if there was a default in performance, which had occurred,<sup>208</sup> and there was substantial

compliance with the regulatory requirement that the contractor have an opportunity to present matters for consideration.<sup>209</sup>

More hearings were held in 1956, during which another subcommittee questioned Schlesinger about a government hat contract that he performed as a subcontractor while debarred.<sup>210</sup> The subcommittee was obviously dismayed by the fact that a debarred contractor could continue to do government work as a subcontractor, and it attempted to determine through testimony if the subcontract had been approved by the contracting officer.<sup>211</sup> While the results of that inquiry were not conclusive, the subcommittee gathered sufficient evidence to state in its report that, "the Government's decision to debar Schlesinger after the subcommittee hearings in 1955, and then knowingly permit him to work on a Government subcontract, makes a mockery of the debarment procedures."<sup>212</sup> Another point made in the report was that other individuals and their firm, debarred or suspended in 1952,<sup>213</sup> had "brazenly and contemptuously circumvented this action by using 'front companies' to obtain Government contracts."<sup>214</sup> The subcommittee report recommended that seven individuals "should receive no further contracts from the United States Government."<sup>215</sup> It also recommended that "[t]he Department of the Army take the necessary steps to prevent 'front companies' from being used by debarred individuals for the purpose of obtaining business with the Government."<sup>216</sup>

Evidently in response to the concerns of the report regarding the subcontracting issue, the Army

asked the Comptroller General whether some method could be devised to preclude debarred contractors from subcontracting on government contracts.<sup>217</sup> The Comptroller General replied that such a restriction was acceptable in principle and suggested a contract provision "that no portion of the work be sublet, except subject to determination and approval by the contracting officer of a proposed subcontractor's qualifications . . . ."<sup>218</sup> But the problem with such a provision is that it would have required the contracting officer to pass upon the responsibility of every proposed subcontractor. Probably for that reason, no regulatory change ever arose out of the inquiry.<sup>219</sup>

The House of Representatives got into the military clothing investigations by looking into a different group of clothing manufacturers. The House report emphasized both delivery delinquencies and the plethora of interrelated firms submitting bids on the same government clothing contracts so that as many as five firms controlled by the same individual might bid on one contract.<sup>220</sup> The committee recognized that the current regulations permitted that "[i]f there is a history of repeated failures to deliver according to contract terms, the Government can . . . debar them [the firms] from further Government procurement."<sup>221</sup> However, although the firms under investigation, all controlled by one person, had had as many as 50 delinquent contracts, not one contract was ever defaulted and none of the firms was ever debarred for its delivery delinquencies.<sup>222</sup> The committee recommendations included that "[a] history of repeated delin-

quencies by a contractor should constitute sufficient cause for, and lead to, his suspension or debarment for a designated period of time.<sup>223</sup>

#### EARLY RISE OF DUE PROCESS CONSIDERATIONS

In October of 1957, a major revision was made to the ASPR provisions regarding suspension and debarment.<sup>224</sup> For the first time, a joint consolidated list was prescribed within DOD which was to be maintained by the Assistant Judge Advocate General of the Army.<sup>225</sup> The ASPR stated that for both suspension and debarment the action was "for the purpose of protecting the interest of the Government and not for punishment."<sup>226</sup> Contractors were, for the first time, notified of their "proposed debarment" rather than getting notice of the completed action.<sup>227</sup> The ASPR provided that contractors would be notified that debarment was being considered and why it was being considered, and would be given time in which to submit any information they wanted considered in the decision.<sup>228</sup> Interestingly enough, the regulation did not indicate if a contractor proposed for debarment was eligible for contract awards pending a decision on his proposed debarment.

The causes for debarment and suspension were also rewritten. Both added provisions that the action could be taken "[f]or other cause of such serious and compelling nature as may be determined by the Secretary of the Department concerned to justify" suspension or debarment.<sup>229</sup> It appears likely that the provisions

were a direct outgrowth of the controversy over the Schlesinger debarment.

The standard for suspension remained suspicion, but the grounds were amended to parallel the grounds for debarment. They included fraud or criminal offense incident to obtaining, attempting to obtain, or performing a contract; violating federal antitrust statutes in submitting bids or proposals; and the suspected commission of offenses such as "embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty, which seriously and directly affects the question of present responsibility as a Government contractor . . . .<sup>230</sup>" The quoted language was also added as grounds for debarment if a conviction or judgment for such crimes was entered against a contractor.<sup>231</sup>

In 1959, the civilian agencies first codified regulations regarding debarment under the Federal Procurement Regulation (FPR) in the CFR.<sup>232</sup> The regulations provided only for debarment, the grounds for which closely parallel the ASPR provisions of 1954. However, an interesting variation was that the regulation provided that a contractor could be notified of the debarment or the intent to debar at the option of the agency.<sup>233</sup>

No further developments of note occurred until 1961, when GSA supplemented the FPR provisions on debarment.<sup>234</sup> GSA provided that a contractor would be given notice of an intent to debar that would allow him

15 days to request a hearing. If no hearing was requested then the debarment became effective.<sup>235</sup> These were the first regulations to provide a hearing to a contractor who was being considered for debarment. The military had provided the contractor with a notice of proposed debarment since 1957, but that notice only allowed an opportunity to provide matters that the contractor wanted to have considered before a final decision was made. GSA provided that requested hearings would be before their Board of Review, and that the contractor could "appear, with witnesses and counsel, to present facts or circumstances showing cause why such firm or individual should not be debarred."<sup>236</sup> Hearings had to be held within 30 days after receipt of the request, and the Board chairman was required to inform the contractor of the decision.<sup>237</sup> The only exception to the hearing requirement was if the debarment action was being taken based on the debarment of the contractor by another agency.<sup>238</sup>

In 1962, the only change of note was that GSA changed the hearing forum from the Board of Review to before the Administrator or his representative.<sup>239</sup> That same year, however, the second study on suspension and debarment was released.<sup>240</sup> The study was conducted by the Administrative Conference of the United States (ACUS) and has been described as "the most thorough research job ever done on the actual facts of debarment and suspension by the federal government."<sup>241</sup> The study aptly noted that the issue was the balancing of:

the Government's operational interest in  
excluding the dishonest and the willful or



chronic contract violators from its programs by means that do not impede on-going contracting or impair law enforcement, and the competing public interest in assuring that the debarment power is exercised in a fair and open manner because of the severe, often fatal consequences of this government sanction.<sup>242</sup>

The study consulted with private industry, the private bar, and with military and civilian agencies throughout the government. The study did not argue with the basic concept of debarment; instead its criticisms were of the agencies' procedures or the lack thereof. The study did, however, have some reservations about the concept of suspension.<sup>243</sup> The report recommended that the "practice of summary suspensions of . . . [contractors] from Government contracting without notice and opportunity for a trial-type hearing should be discontinued."<sup>244</sup> The study did recommend, however, that a temporary suspension be allowed while the debarment decision was being made.

Procedural deficiencies noted by the ACUS committee included a lack of procedural safeguards insuring fairness, inadequate rules on the scope of debarment and grounds for debarment, excessive length and lack of uniformity in debarment periods, and the "combination of prosecutive and judicial functions in [debarment] decision-making . . . ."<sup>245</sup> The committee noted several deficiencies in procedural safeguards, including the lack of advance notice of suspension, the fact that in some cases the basis or evidence for the action

could be withheld, and the fact that suspensions were unlimited in duration.<sup>246</sup> The committee also noted the use of de facto debarments, in which contracting officers within an agency stopped awarding contracts to a contractor based on repeated nonresponsibility determinations, but never initiated a debarment or suspension against the contractor, relying instead on secret agency lists.<sup>247</sup> The ACUS committee made a number of recommendations, which have been adopted in some form in subsequent regulations. Among them were recommendations that:

1. All methods by which blanket decisions of nonresponsibility were made (suspension, debarment, de facto debarment, or whatever else they were called<sup>248</sup>) should be preceded by notice of the action, supported by reasons, to the contractor and any affiliates to whom the action would be applied.<sup>249</sup>

2. The grounds for debarment should be specifically stated and the standards published, including standards and rules regarding affiliates and the imputation of conduct.<sup>250</sup>

3. The duration of debarments should be limited to three years, because that was the maximum provided for in any statute, and some provision should be provided for the early removal of the debarment if a showing of present responsibility is made during the debarment.<sup>251</sup>

4. All proposed debarments and suspensions should notify the contractor that he has a right to a "trial-type hearing before an impartial agency board or hearing examiner in the event there are disputed

questions of fact relevant to the debarment issue.<sup>252</sup>" With regard to this recommendation, the ACUS committee noted the position of the Special Subcommittee of the American Bar Association (ABA subcommittee) that this recommendation failed to address the situation in which the facts were not in dispute. The ABA subcommittee stated that "[w]hat is needed here is not an 'adversary hearing' in the sense of an impartial factfinding, but an opportunity to explain and demonstrate present responsibility as a contractor."<sup>253</sup> The ACUS committee did not adopt this position as part of its official recommendations, but noted that "[i]n the absence of a [factfinding] hearing, such argument would be made to the debarment official."<sup>254</sup>

Another set of recommendations pertaining to suspensions were adopted only in a selective manner. As mentioned previously, the ACUS committee recommended that the only type of suspension that should be allowed was a temporary suspension while the debarment decision was being made. Two versions of this were envisioned by the committee, one for actions based on a "criminal conviction or civil judgment affecting . . . present responsibility . . . , or upon probable cause for belief that . . . [the contractor] has committed fraud or engaged in other conduct showing a substantial lack of present responsibility" and another version for a suspension accompanying a proposed debarment for any other reasons.<sup>255</sup> The first version of this temporary suspension could be imposed only for one year, with one six month extension possible upon the request of the Attorney General, unless federal legal proceeding were

initiated, at which time the suspension could continue until the end of those legal proceedings.<sup>256</sup> The second version of the temporary suspension could last for 90 days while the debarment was being processed, with extensions up to a maximum period of 180 days allowed.<sup>257</sup>

#### EMERGENCE OF THE COURTS AS AN INFLUENCE

Prior to 1964, the main factors influencing the development of the suspension and debarment regulations were internal administrative concerns, congressional concerns, and the opinions of the Comptroller General. Even the ACUS study of 1962, while more systematic, formalized, and open to the comments of those outside the government, was essentially a continuation of this process of internal evolution.<sup>258</sup> Based on these influences, by 1964 the criteria by which debarments and suspensions were imposed had developed to closely parallel the standards by which they are presently imposed under the FAR. Although indications in the direction existed, what had not fully developed by this time was a process by which the rights of the contractor would be protected during a suspension or proposed debarment. In part this was because for a long time it was the law that a potential contractor had no rights in the process by which the government let its contracts.<sup>259</sup>

Finding contractor rights in suspension and debarment actions was an extension of the process by which the courts found contractor rights in the

contracting process with the government. Very simply stated, the change occurred because the perception of the courts changed. Initially, the courts were of the opinion that the procurement regulations were solely for the benefit of the government and bestowed no enforceable rights on a potential contractor, but this evolved into the opinion that the procurement regulations sometimes bestowed duties and rights upon both the government and potential contractors.<sup>260</sup>

The first case in which a debarred contractor was found to have standing was Copper Plumbing & Heating Co. v. Campbell.<sup>261</sup> The debarment was an inducement debarment not specifically based on a statute such as the Walsh-Healey Act or Buy American Act, and the firm alleged that its debarment was improper because the regulations under which it was debarred were unlawful.<sup>262</sup> The district court dismissed the suit, holding that the firm had no standing and the debarment was authorized.<sup>263</sup> The appeals court, however, stated that "[t]he listing [debarment] with its consequence was specifically directed against" the firm and was a limitation on their opportunity to do government work.<sup>264</sup> The court therefore reversed as to standing, relying on section 10 of the Administrative Procedure Act (APA), and granted review.<sup>265</sup> The court stated that "[w]hile they do not have a right to contract with the United States on their own terms, appellants do have a right not to be invalidly denied equal opportunity under applicable law to seek contracts on government projects."<sup>266</sup>

## JUDICIAL REQUIREMENT OF FAIRNESS

After Copper Plumbing, standing for suspensions and procurement debarments was an open question.<sup>267</sup> In 1964, however, the issue of standing for a contractor debarred pursuant to a procurement debarment was addressed in Gonzalez v. Freeman.<sup>268</sup> The facts of the case were that the Commodity Credit Corporation (CCC) was a corporate instrumentality of the Department of Agriculture recognized by the court as standing "in the same position as an executive agency."<sup>269</sup> In January 1960, the CCC suspended Gonzalez<sup>270</sup> based on an investigation into the misuse of official inspection certificates on shipments by Gonzalez to Brazil. A felony indictment was brought against Thomas Gonzalez in May 1961, and he pleaded guilty to a misdemeanor based on the same facts in January 1962. After considering information and arguments submitted by Gonzalez, CCC debarred Gonzalez until January 1965. The debarment decision gave "no reasons or grounds for the final debarment action."<sup>271</sup> The court found that the Department of Agriculture and CCC had not published any regulations relating to the misconduct charged against Gonzalez, although similar offenses regarding other commodities were specifically mentioned as grounds for debarment in Department of Agriculture regulations.<sup>272</sup> The court also found that there was never a specific recitation of charges in the record; there was no hearing; no evidence was registered; and no opportunity was provided to cross-examine witnesses supporting the debarment action.<sup>273</sup>

The court found standing on the same grounds as in Copper Plumbing, a legal wrong had been committed pursuant to section 10(a) of the APA.<sup>274</sup> The protected right was that the government could not declare a contractor ineligible for government contracts in a procedurally or substantively arbitrary manner.<sup>275</sup> Allegations revealing "an absence of legal authority or basic fairness in the method of imposing debarment presents a justiciable controversy . . . [and] [t]he injury . . . alleged . . . gives them standing to challenge the debarment processes by which such injury was imposed. See Copper Plumbing & Heating Co. v. Campbell.<sup>276</sup>" Gonzalez was widely recognized as a landmark decision in the area,<sup>277</sup> and standing was never again a serious issue in the review of debarment or suspension actions by the courts.

Upon deciding that there was a reviewable harm in the suspension and debarment area, the next question before the court was whether there was authority for the government to make such decisions. The question as to debarment authority had been affirmatively answered in Schlesinger,<sup>278</sup> and the Gonzalez court arrived at the same answer. The court concluded "that such a power is inherent and necessarily incidental to the effective administration of the statutory scheme."<sup>279</sup> Apparently, however, the Gonzalez court drew a distinction between the authority for debarment in its case and in Schlesinger. The Gonzalez court did not cite Schlesinger as authority for the finding of inherent debarment power. Instead, the case was cited in a footnote for another proposition where it was stated

that the "court [in Schlesinger] found debarment specifically authorized by statute which was implemented by regulations.<sup>280</sup>" The Gonzalez court also indicated, in dicta, that a "summary debarment, in the nature of a temporary suspension," was probably acceptable.<sup>281</sup> Again, since the Gonzalez decision no court has questioned the right of agencies to impose suspensions or debarments absent a specific statutory grant of authority.

Avoiding Gonzalez's allegation that the debarment violated constitutional due process rights, the court decided the issue on statutory grounds, stating:

In short, we construe, the pertinent statutory scheme as authorizing debarment, but as not authorizing debarment without either [1] regulations establishing standards and a procedure which are both fair and uniform or [2] basically fair treatment of appellants. The scope and detail of these regulations are for the agency to resolve in the first instance. We have suggested enough on this subject to make further elaboration unnecessary.<sup>282</sup>

The suggestions made by the Gonzalez court concerning basic considerations of fairness included: 1) regulations publishing debarment standards and procedures; 2) that the procedures should include specific notice of the charges, a chance to present evidence, and a chance to cross-examine adverse witnesses; and 3) that a final decision, with findings and conclusions based upon the record, be prepared.<sup>283</sup>



The effects of the ACUS recommendations and the Gonzalez decision were reflected in regulatory changes during 1964. While the Gonzalez decision had much more impact on the FPR than on the ASPR, both regulations underwent extensive revision.

DOD modified the ASPR so that debarments would usually not exceed three years in length.<sup>284</sup> The ASPR also added provisions allowing the debarment and suspension of all known affiliates of a contractor,<sup>285</sup> and provided for the imputation of the criminal conduct of an individual to a business firm "when the impropriety was performed in the course of official duty or with the knowledge or approval of the business firm."<sup>286</sup> The ASPR clarified the point that if "no suspension is in effect . . . the notice of proposed debarment shall state that no contracts will be awarded pending the debarment determination."<sup>287</sup> Suspensions were limited to a maximum of 18 months unless "prosecutive action" was begun within that time period,<sup>288</sup> and the notice of a suspension was required to describe the general nature of the irregularities without disclosing government evidence.<sup>289</sup>

The FPR's revision in 1964 adopted provisions from the ASPR to such an extent that for all practical purposes the grounds for debarment and suspension under the two regulations were the same.<sup>290</sup> The FPR added: 1) the concept of suspension on all the same grounds as in the ASPR, although the use of suspension by the agencies remained optional;<sup>291</sup> 2) the catch-all clause for debarment;<sup>292</sup> 3) the idea that affiliates could be debarred and suspended;<sup>293</sup> and 4) the idea that conduct

could be imputed in suspension or debarment actions,<sup>294</sup> with the addition that the FPR allowed the imputation of a firm's misconduct to an individual when a debarment decision was being made.<sup>295</sup>

The one addition to the FPR which differed radically from the ASPR, the adoption of a GSA type hearing, was largely a result of the Gonzalez decision.<sup>296</sup> The FPR provided that a contractor would be notified that debarment was being considered and provided the grounds for the action, and would be given a hearing if he requested it.<sup>297</sup> GSA had lobbied for a "government-wide, uniform policy" providing administrative hearings, with full cross-examination rights, as a right in all debarment cases.<sup>298</sup> The FPR, however, left the hearing procedures to the discretion of the agencies, so long as they "satisfy the demands of fairness. . . ."<sup>299</sup> At a minimum they were to include an opportunity to present an opposition in person or writing and with counsel, if desired.<sup>300</sup> The one exception was if the action was being taken pursuant to the action of another agency, but even in such a case the contractor was to be allowed to present information as to why the debarment should not be extended to the other agency.<sup>301</sup>

The Department of Agriculture, Atomic Energy Commission, Coast Guard, and National Aeronautic and Space Administration added supplements on suspension and debarment in 1964.<sup>302</sup> Also in 1964, the CCC published its first regulations on suspension and debarment.<sup>303</sup> The only noteworthy differences were that the CCC provided for the appeal of debarment

decisions to its Contract Disputes Board<sup>304</sup> and the Department of Agriculture provided for appeal of debarment decisions to its Board of Contract Appeals,<sup>305</sup> and the Atomic Energy Commission allowed reconsideration of debarment decisions.<sup>306</sup>

From 1965 until 1974 only minor changes occurred in the suspension and debarment regulations. The ASPR made minor housekeeping changes in 1965, including adopting detailed reporting requirements that had previously been in the departmental supplements.<sup>307</sup> During 1966, GSA amended its procedures providing for the use of suspension, and added a provision very similar to the Army's 1954 provision regarding contractor attempts to evade their debarment or suspension.<sup>308</sup> Also, in 1969 the Air Force withdrew its procurement supplement, including their coverage of suspension and debarment.<sup>309</sup> The Air Force never replaced its suspension and debarment supplement under the ASPR.

The second case to address suspension and debarment, Horne Brothers, Inc. v. Laird,<sup>310</sup> was decided in 1972. The Navy suspended Horne Brothers, Incorporated, (Horne) in December 1971, based on an investigation indicating that Horne had given "gratuities and favors to Naval personnel assigned to official contractual or inspection duties in relation to [Horne] . . . ."<sup>311</sup> From January 12, 1972, until February 14, 1972, much communication occurred between Horne's officers and attorneys and Navy personnel, culminating in a request by Horne for a hearing on the suspension.<sup>312</sup> The Navy denied the request because the ASPR had no provision requiring a hearing in the event of a suspension.<sup>313</sup>

Based on those facts, the district court granted Horne's request for an injunction, finding that the suspension was invalid based on: 1) violations of the suspension regulations, 2) violations of the small business provisions of the ASPR, 3) an inadequacy of standards and procedures in the suspension regulations, and 4) a violation of the due process requirements of the fifth amendment.<sup>314</sup>

Although the circuit court reversed, based on its finding that Horne was not likely to prevail on the merits, it clearly showed its displeasure with the suspension regulations. The court stated, "there are serious and fundamental questions regarding the fairness of procedures utilized by the Government in suspending contractors."<sup>315</sup> The court was willing to accept "a temporary suspension . . . , not to exceed one month," without an opportunity to "confront . . . [the] accusers and to rebut the 'adequate evidence' . . . ."<sup>316</sup> However, the court indicated that "fundamental fairness" required "specific notice as to at least some charges alleged . . . [and], in the usual case, an opportunity to rebut those charges."<sup>317</sup> Analogizing the adequate evidence standard to the probable cause standard used for arrests, search warrants, or preliminary hearings, the court indicated that such levels of evidence could be shown in the usual case without disclosing too much government evidence.<sup>318</sup>

The circuit court specifically stated that it did not mean "every suspension action the Government [takes] must offer the contractor a proceeding within one month of . . . suspension."<sup>319</sup> The court indicated

that national security reasons, fear of prejudicing a criminal action, or possible use of the proceeding as an improper discovery tool by potential criminal defendants might act to curtail a contractor's right to such a proceeding.<sup>320</sup> Also, the court specifically stated "[w]e do not discuss what the rights of a suspended contractor are in the usual post indictment situation.<sup>321</sup>" However, in the normal pre-indictment situation the court made it clear that the contractor was to be provided some sort of opportunity for review, and provided some suggestions for the more difficult situations.<sup>322</sup> It should be noted that the circuit court never indicated that a constitutional due process right existed, only that the existing suspension procedures did not provide "fundamental fairness . . .  
. 323"

#### EFFECTS OF THE FAIRNESS REQUIREMENT

A third government study addressing suspension and debarment procedures was published in 1972.<sup>324</sup> The Commission on Government Procurement (COGP) report was the culmination of a three year study of the federal government procurement process, a portion of which addressed inducement and procurement debarments. The report noted variations in procedural safeguards between types of action (among the various inducement debarments, procurement debarment, and suspension) and between agencies.<sup>325</sup> The commission's formal recommendation was aimed only at inducement debarments,<sup>326</sup> but its discussion of procurement debarments and suspension

indicated a fundamental concern over due process.<sup>327</sup> The commission believed that the most significant difference between the ASPR and FPR was that the FPR "in effect prescribes a hearing."<sup>328</sup> Yet the commission noted that several elements of an adversary hearing, such as subpoena powers, the right to cross-examine, and a functional separation between those urging debarment and those making the final decision were still not provided.<sup>329</sup> The commission discussed, but did not endorse outright the ACUS recommendations of 1962.<sup>330</sup> Instead, the commission stated that "it is still unclear what kind of administrative proceeding is essential to satisfy due process requirements."<sup>331</sup> The commission then recommended "a thorough, expert policy review of debarment and suspension proceedings, . . . such a review should have as its goal published, uniform, expeditious, and fair rules."<sup>332</sup> The commission recommended the Office of Federal Procurement Policy (OFPP) (proposed at that time) for this job.<sup>333</sup>

In 1973, DOD proposed changes to the ASPR based on the Horne Brothers decision.<sup>334</sup> The proposal provided that without disclosing government evidence, suspended contractors were to be advised of the reason for their suspension.<sup>335</sup> The contractor was also to be given an opportunity for a hearing unless the suspension was based on an indictment or, after coordination with DOJ, it was determined that a hearing "would adversely affect possible civil or criminal prosecution . . . ."<sup>336</sup> In the event that a hearing was not allowed, a memorandum of that determination was to be added to the record, and the contractor was to be notified of the

decision and given an opportunity to submit "any information or argument in opposition . . . in person, in writing, or through representation."<sup>337</sup>

DOD made no substantive changes to the proposed amendments before adopting them,<sup>338</sup> but comments were received from the American Bar Association Section of Public Contract Law (ABA) and the Council of Defense and Space Industry Associations (CODSIA). Both the ABA and CODSIA expressed concerns that the proposed ASPR changes were insufficient to protect a contractor's due process rights as announced in the circuit court's Horne Brothers opinion.<sup>339</sup> Their major concerns were that the proposed regulations did not provide: 1) sufficiently specific notice, 2) specific hearing procedures providing for an adversary-type hearing allowing for effective cross-examination, 3) sufficient disclosure of evidence, 4) for a reduction in the 18 month period that a suspension could continue, and 5) for the "elimination of the assumption that a mere indictment regardless of cause is sufficient to justify a suspension without an opportunity to be heard and cross-examine witnesses."<sup>340</sup>

In April 1974, the FPR suspension and debarment provisions were specifically amended to provide suspended contractors more due process rights pursuant to the decision in Horne Brothers.<sup>341</sup> The changes were essentially the same as the ASPR provisions. The only major difference was that the FPR required that agencies coordinate a suspension hearing not only with DOJ, but also with the Department of Labor to determine

if the hearing "would adversely affect . . . possible Labor proceedings . . . ."<sup>342</sup>

One of the consequences of the COGP recommendation on suspension and debarment was the establishment of an interagency task group to study suspension and debarment procedures. The task group's recommendations were published for comment in May 1975.<sup>343</sup> The task group recommended that: 1) mandatory standards and procedures be developed for use in all procurement debarments and suspensions; 2) a suspension or debarment have government-wide effect; and 3) that a provision be added allowing for the reinstatement of a contractor upon "demonstrated compliance."<sup>344</sup> The reported comments, which are few, included one from the Aerospace Industries Association which strongly opposed giving suspensions or debarments government-wide effect and called for "full due process safeguards" before the imposition of any debarment.<sup>345</sup>

The next judicial development in the due process requirements applicable to debarments occurred when the Army debarred Martin L. Roemer on August 23, 1976. In Roemer v. Hoffmann,<sup>346</sup> the court set-aside Roemer's debarment and remanded the case to the Army for reconsideration. The relevant facts were that while Roemer was an employee of the Army and Air Force Exchange Service (AAFES) in 1965, he accepted a \$2,500 gratuity.<sup>347</sup> In 1966, Roemer left AAFES and became a manufacturer's representative. He was indicted for accepting the gratuity in 1970 and was suspended shortly thereafter. The suspension was lifted after 29 months without resolution of the criminal charges.



Roemer was subsequently convicted in 1974 and, based on that conviction, he was proposed for debarment in June 1976.<sup>348</sup> Roemer presented an opposition to the proposed debarment, but was debarred in August. The Roemer court agreed that "Roemer's offense was of sufficient gravity to give a decision-maker pause to question Roemer's present and likely future responsibility in dealing with the government."<sup>349</sup> However, the Roemer court noted many factors that Roemer presented to the Army debarring official that might work to mitigate the offense's impact on present responsibility.<sup>350</sup> While the Army debarring official noted these factors in his decision memorandum, he did not explain why he "attributed little or no importance to them, and what it was about the offense which necessitates, despite these factors, a debarment of three years."<sup>351</sup> While this decision did not directly engender any regulatory changes, it was now clear that the courts expected debarring officials not only to consider matters presented in opposition, but also to indicate clearly in their decisions the effect of those matters on the final decision.

The author of an unpublished thesis written in 1975 interviewed many people in government involved in the suspension and debarment process. It was his opinion that the actual use of suspension and debarment was very conservative, stating "debarments or suspensions, for violations other than criminal convictions or indictments almost never occur."<sup>352</sup> He also noted that while the rules permitted the extension of suspensions or debarments to affiliated parties, this

seldom occurred, probably because on the same inherent caution of the people responsible for suspensions and debarments.<sup>353</sup>

An article published in 1976 seems to support these conclusions. That article was noted that the number of debarments and suspensions, other than in the Department of Housing and Urban Development (HUD), had fallen drastically since 1962. The figures indicated that in 1962 about 340 contractors were suspended or debarred, while in 1975 the cumulative number of suspended and debarred contractors was only about 124 (excluding suspensions and debarments by HUD as its predecessor agencies imposed no suspensions or debarments in 1962).<sup>354</sup> The author speculated that this was possibly because agencies were using nonresponsibility determinations instead of the "more complex procedures now required" to impose a suspension or debarment.<sup>355</sup> Although he indicated that he had found no evidence supporting that speculation,<sup>356</sup> in retrospect it appears he was correct.

#### DE FACTO DEBARMENTS AND CONSTITUTIONAL DUE PROCESS

In 1975, Meyers & Meyers, Inc. v. United States Postal Service<sup>357</sup> was decided. In Meyers the main issue was a claim under the Federal Tort Claims Act for the negligent refusal of the Postal Service to renew six mail route contracts. As a part of its decision, the court recognized three successive nonresponsibility determinations, all based on the same allegations, as constituting a de facto debarment,<sup>358</sup> and therefore

remanded the case. A portion of the charge to the district court was to determine "whether a prior hearing was required by either the Constitution or the Postal Service regulations" before the contractor could be debarred.<sup>359</sup> No subsequent opinion in the case was published.

In 1978, another case of de facto debarment was decided. In Art Metal-U.S.A., Inc. v. Solomon,<sup>360</sup> the district court found that GSA's refusal to award four contracts and the termination of another contract for convenience,<sup>361</sup> all based on press reports and an ongoing investigation,<sup>362</sup> resulted in the de facto debarment of Art Metal.<sup>363</sup> The court found the de facto debarment improper, "enjoin[ed] further unlawful acts of debarment," and "restrain[ed] . . . [GSA] from perpetuating its prior unlawful acts of debarment."<sup>364</sup>

In 1979 and 1980, the case of Old Dominion Dairy Products, Inc. v. Secretary of Defense,<sup>365</sup> was decided and, aside from Gonzalez and Horne Brothers, is one of the most important decisions in the suspension and debarment field.<sup>366</sup> The case was not postured as a de facto debarment; instead, it was a request for judicial relief from two separate nonresponsibility decisions, both occurring on the same day,<sup>367</sup> based on a lack of integrity. Both the district court opinion and the circuit court opinion discussed de facto debarments.<sup>368</sup> The district court essentially dropped the issue based on the Air Force's initiation of a suspension action.<sup>369</sup> The circuit court noted that the firm's claim of a de facto debarment was "not frivolous,<sup>370</sup>" but considered itself "constrained to limit our focus to

the issues originally submitted to the court on this appeal.<sup>371</sup>" While the case is a review of a contracting officer's nonresponsibility determination, the circuit court's real concern was de facto debarment, i.e. that a series of nonresponsibility decisions based on issues of integrity would be used to effectively prevent the award of any government contracts to a contractor.<sup>372</sup> The only difficulty that the court or anyone else can have in characterizing the case as a de facto debarment is that in Old Dominion this "series" of nonresponsibility decisions occurred on the same day.

The facts of the case were that Old Dominion Dairy Products, Incorporated, (Old Dominion) had two bids rejected by two different Air Force contracting officers on the same day. Each rejection was based on a determination of nonresponsibility,<sup>373</sup> and the basis for each decision was an audit report and investigation indicating that Old Dominion had failed to comply with previous government contracts and had submitted fraudulent pricing information.<sup>374</sup> Old Dominion sued, alleging that the two nonresponsibility determinations were "illegal"<sup>375</sup> and that it had "a constitutional right to notice and an informal hearing before rejection of its low bid . . . ."<sup>376</sup> The district court dismissed the case based on its findings of ample evidence to support the nonresponsibility determinations, and that the claim to a constitutional right was "not supported by the regulations . . . [and] is without merit, see Board of Regents v. Roth, 408 U.S. 564, 576-78 . . . ."<sup>377</sup>

On appeal the circuit court agreed that there was ample basis for the nonresponsibility decisions,<sup>378</sup> but found the constitutional due process rights argument convincing. The circuit court found that contractors have a constitutionally protected liberty interest arising out of the stigmatizing effect of a nonresponsibility determination based on integrity issues.<sup>379</sup> Therefore, the contractor had a due process "right to be notified of the specific charges" and a due process right to an "opportunity to respond" to the charges "in whatever time is available" before the government acts on the charges.<sup>380</sup> While that part of the opinion clearly applied to responsibility determinations, the court also stated:

we hold that when the Government effectively bars a contractor from virtually all Government work due to charges the contractor lacks honesty or integrity, due process requires that the contractor be given notice of those charges as soon as possible and some opportunity to respond to the charges before adverse actions is taken.<sup>381</sup>

That part of the opinion clearly applies to debarments and suspensions, be they de facto or de jure. Since Old Dominion, it has been generally accepted that all suspension or debarment actions must provide contractors due process rights arising out the deprivation of a constitutionally protected liberty interest.<sup>382</sup>

The final court case occurring during this time period was a suspension case. In late 1980 and January 1981, the case of Transco Security, Inc. of Ohio v.

Freeman<sup>383</sup> wound its way through the courts. Transco Security, Incorporated, (Transco) provided security services for GSA at various GSA buildings. Based on evidence of fraud in "obtaining and performing public contracts," GSA suspended Transco and its owner on January 28, 1980.<sup>384</sup> On February 27, 1980, after coordinating with DOJ, GSA denied Transco's hearing request.<sup>385</sup> Transco sought an injunction which was denied. On appeal, the circuit court accepted the proposition that a hearing could be denied on the advice of DOJ, and stated that in such situations the "opportunity to present information or argument, in person, in writing, or through representation in opposition to the suspension<sup>386</sup>" would satisfy due process requirements if coupled with adequate notice.<sup>387</sup> The court then looked at the notice that was provided to Transco and found it deficient in that it was not specific enough to allow Transco to prepare a meaningful opposition.<sup>388</sup> The court noted that "[t]he need for more specific notice is particularly critical when the regulations provide in lieu of an adversary hearing the opportunity to submit information in opposition to suspension.<sup>389</sup>"

#### DEVELOPMENT OF THE FAR PROVISIONS

During the period 1974-1981 only minor changes occurred within the ASPR (Defense Acquisition Regulation (DAR) as of 1979<sup>390</sup>) and FPR provisions relating to suspension and debarment. By 1978, however, the executive agencies were working to develop an accep-

table coverage of the suspension and debarment area for what was to become the FAR. The GSA FAR Project Office developed the initial proposed FAR coverage for suspension and debarment. Spreadsheets equivalent DAR and FPR provisions side by side, proposed FAR coverage would be written and placed next to the equivalent DAR and FPR coverage. These spreadsheets were provided to the DOD FAR Project Office for comment in late 1978. DOD returned its comments to GSA in December 1978.<sup>391</sup> GSA made revisions based on the DOD comments and provided the revised spreadsheets to DOD and OFPP in March 1979.<sup>392</sup> DOD provided new comments to GSA and OFPP in April 1979.<sup>393</sup> On February 24, 1981, GSA provided a copy of the proposed coverage on suspension and debarment to OFPP for publication and public comment.<sup>394</sup>

A greatly changed version, however, was published in March 1981.<sup>395</sup> While the grounds for suspension and debarment were essentially unchanged, the procedures were greatly expanded and substantially changed. The scheme envisioned a preliminary decision by an "initiating official"<sup>396</sup> with notice of an "intention to debar" to the contractor.<sup>397</sup> Matters in opposition would be provided to the initiating official, who would decide whether to continue the action or terminate it.<sup>398</sup> If he believed that debarment was still appropriate then he would prepare a "recommended final determination" and forward it to the debarring official for a final decision.<sup>399</sup> If the debarring official issued a final determination debarring the contractor, the contractor could then request a hearing with a

"hearing officer.<sup>400</sup>" The final determination of debarment would become effective ten days after the date it was mailed only if no request for a hearing was received.<sup>401</sup> The hearing officer was to be part of the agency's Board of Contract Appeals<sup>402</sup> and was to review the decision. Hearings on debarments were to be as "informal as practicable" yet allow an appearance with witnesses and counsel, provide for cross-examination of witnesses and "[w]here authorized by law, . . . issue subpoenas for witnesses and documents as necessary to reach" a decision.<sup>403</sup> If the hearing officer upheld the debarment his decision would be effective when issued.<sup>404</sup> The suspension provisions provided for essentially the same procedures,<sup>405</sup> but became effective upon the suspending official's final decision, and remained in effect during the hearing.<sup>406</sup>

In March 1981, the Senate Subcommittee on Oversight of Government Management held hearings on suspension and debarment procedures.<sup>407</sup> The subcommittee's concerns were that federal agencies were not making sufficient use of suspension and debarment to protect the government, and that the agencies were not exchanging their information on nonresponsible contractors.<sup>408</sup> These concerns arose out of reports of massive fraud and waste amounting to as much as \$25 billion in 1980.<sup>409</sup>

Another factor submitted as an indirect cause for the renewed interest of Congress in suspension and debarment was the Inspector General Act of 1978.<sup>410</sup> That act created an Office of Inspector General (OIG) in each of 12 federal agencies, including GSA.<sup>411</sup> As



can be seen from the statements of personnel from the OIG's for GSA, the National Aeronautics and Space Administration (NASA), and HUD, the suspension and debarment procedures were seen as potentially effective means by which to prevent contract fraud.<sup>412</sup> The creation of the various OIG's, especially within GSA impacted on suspension and debarment in that greater use of the sanction was encouraged, and powerful supporters of the idea of giving the sanction government-wide effect were created.<sup>413</sup>

The subcommittee prepared figures for the period 1975-1981 showing the number of suspensions and debarments by agency.<sup>414</sup> The numbers were quite revealing. Excluding suspension and debarment actions by the Veterans Administration and HUD,<sup>415</sup> 25 agencies took the following actions:

1975	--	24 suspensions and debarments;
1976	--	101 suspensions and debarments;
1977	--	121 suspensions and debarments;
1978	--	108 suspensions and debarments;
1979	--	148 suspensions and debarments;
1980	--	186 suspensions and debarments. <sup>416</sup>

GSA and the Department of Treasury accounted for over half of the figures in almost every year, with the Defense Logistics Agency providing about a quarter of the remaining numbers.<sup>417</sup> Compared to the number of suspensions and debarments in the 1950's, it was clear that, whatever the reasons, the use of the sanction had waned considerably, although the numbers were rising.

The subcommittee's report identified three problems in the suspension and debarment area: 1) the

lack of action against contractors known or suspected of nonresponsible activity; 2) an inadequate system by which suspension and debarment information was circulated within the government; and 3) the failure of agencies to honor one another's suspensions or debarments.<sup>418</sup> The subcommittee recommended that: 1) DOJ "should issue a policy statement encouraging" the use of suspension and debarment; 2) the FPR provisions on suspension and debarment "should be streamlined;" 3) lists of suspended and debarred contractors needed to be updated more fully and more often; and 4) a suspension or debarment by any agency should be considered presumptively valid by all agencies.<sup>419</sup>

In testimony before the subcommittee, OFPP had indicated a desire to publish new, uniform guidance before the end of 1981.<sup>420</sup> On July 22, 1981, OFPP published an invitation for public comment on its proposed policy letter 81-3 on "Government-wide Debarment, Ineligibility, and Suspension."<sup>421</sup> A review of the proposed policy letter shows the basic concepts that had developed since the 1950's in both the grounds for taking suspension and debarment actions and the due process provided when those actions were taken.

A comparison of the proposed policy letter to the proposed FAR coverage forwarded by GSA in February, 1981, and to the version of proposed FAR coverage published in March 1981, clearly shows that the OFPP letter was closer in nature to the February version than the one published in March. One can speculate that the Senate subcommittee hearings and recommenda-

tion that the processes "be streamlined" had had an effect. -

A comparison of the proposed policy letter to the proposed FAR coverage published in March shows major changes in the due process considerations. Gone were the layers of review and appeal, and the sanctions were, once again, effective immediately instead of after what would surely have developed into a prolonged decision process while contractors sought to stave off the effects of suspension or debarment. OFPP adopted a more conservative reading of the hearing requirements of Horne Brothers and Gonzalez and chose not to implement many of the recommendations urged in the 1962 ACUS report. The OFPP policy letter never used the term hearing, providing instead for a presentation of matters in opposition in either a suspension or a proposed debarment, and requiring a fact-finding only if the debarring or suspending official determined that a material fact was in genuine dispute, with the reservations that fact-finding could be denied in a suspension proceeding based upon the advice of DOJ.<sup>422</sup>

Differences between the proposed policy letter and the proposed FAR coverage forwarded by GSA in February, 1981, also show the effect of ensuing events. The proposed OFPP policy letter used language which indicates the adoption of the standard set out in Transco.<sup>423</sup> Also, OFPP's proposed policy regarding a temporary suspension, in cases where no previous suspension existed, during the debarment process was a more reasonable interpretation of the requirements of Horne Brothers than that which was submitted in the

proposed FAR coverage.<sup>424</sup> The proposed FAR coverage on suspension hearings had not set out what was required in such hearings, but it had clearly intended to provide more than the submission of matters in opposition because it provided for that type of submission if the hearing was denied.<sup>425</sup> As stated, OFPP's proposed policy letter adopted a requirement for more than a presentation of matters in opposition only if the suspending official determined that there was a genuine dispute as to a material fact.<sup>426</sup>

Other proposed changes from past regulations included the fact that a conviction based on a plea of nolo contendere was sufficient to support a debarment action.<sup>427</sup> Past regulations had not addressed the issue. Another proposed change was to drop a judgment regarding certain acts as a basis for a debarment action, relying solely on a criminal conviction for those acts.<sup>428</sup> The proposed policy letter provided that affiliates of debarred or suspended contractors could only be suspended or debarred if provided notice and given a chance to respond to their status as an affiliate.<sup>429</sup> The imputation of conduct was retained from the 1964 FPR and ASPR provisions, but it was expanded to allow the imputation of improper conduct between joint venturers and from an individual who, while debarred or suspended, is "employed or otherwise associated in a significant decision-making capacity" to his employer.<sup>430</sup> Another proposed change of some consequence was the acceptance of an indictment as adequate evidence sufficient to support a suspension.<sup>431</sup> Previous regulations did not specifically

provide that an indictment could serve as evidence of the specific bases for suspension, but it is clear that such was the practice.<sup>432</sup>

OFPP received over 600 comments on its proposed policy letter on suspension and debarment.<sup>433</sup> The comments were characterized as "in general negative . . .<sup>434</sup>" The comments of the contractors, the trade groups, and the ABA were generally very critical of the due process protections and the government-wide effect of the proposed policy.<sup>435</sup> They also had the support of GSA which strongly urged the adoption of the due process scheme envisioned by the proposed FAR coverage published in March.<sup>436</sup> Criticism was also voiced at a 1982 meeting of the National Conference of Boards of Contract Appeals Members. One speaker stated that OFPP "refuses to accept the holding . . . that debarment is a quasi-judicial proceeding,<sup>437</sup>" with the speaker citing to Peter Kiewit Sons' Co. v. United States Army Corps of Engineers.<sup>438</sup> The speaker also noted that the ABA House of Delegates had approved a proposed debarment statute that would: 1) give the suspension and debarment authority to an independent board and remove it from the agencies; 2) require the board to "focus on the contractor's present responsibility instead of its past conduct;" 3) require "adequate notice and a hearing" before the imposition of debarment; and 4) "provide[] remedies for de facto debarment."<sup>439</sup>

Despite these criticisms, OFPP issued its policy letter with minimal changes,<sup>440</sup> mostly reorganizing and supplementing it for clarity and adopting provisions that had existed in older versions of suspension and

debarment regulations.<sup>441</sup> Among the substantive changes were: 1) the changing of the general principle that debarment and suspension were actions of a "drastic" nature to a "serious" nature;<sup>442</sup> 2) reinstating judgments for certain acts as a basis for debarment instead of relying just on criminal convictions for those acts;<sup>443</sup> 3) changing the required standard of proof in order to impose a debarment on any basis other than a conviction or judgment from "substantial evidence" to a "preponderance of the evidence;<sup>444</sup> 4) affiliates were allowed to contest the basis for the underlying debarment or suspension as well as their status as affiliates;<sup>445</sup> and 5) the dropping of the provision which allowed the imputation of misconduct by an individual who, while debarred or suspended, is hired or becomes associated in a significant capacity, to his employer.<sup>446</sup>

The policy letter became effective August 30, 1982.<sup>447</sup> The FPR issued an implementing regulation which became effective on September 30, 1982,<sup>448</sup> and the DAR was amended on December 27, 1982.<sup>449</sup> Both the FPR and DAR provisions were essentially reiterations of the OFPP policy letter. On April 1, 1984, the provisions of the OFPP policy letter, with extremely minor changes, became effective as the FAR provisions on suspension and debarment.<sup>450</sup>

#### CONSEQUENCES OF THE FAR COVERAGE

In part because of the changed suspension and debarment regulations, and in greater part because of

the increased emphasis within the government on contract fraud and waste,<sup>451</sup> these procedures are being used much more often. A report by the DOD OIG (DODIG) shows DOD suspensions and debarments as totaling: 72 in 1980; 147 in 1981; 179 in 1982; 323 in 1983; and 402 in fiscal year 1984.<sup>452</sup> Later reports show that this trend has continued with total DOD suspension and debarment actions, each fiscal year, totaling: 582 in 1985;<sup>453</sup> 895 in 1986;<sup>454</sup> and 434 in the first half of 1987.<sup>455</sup> As the Army reports suspending and debarring 414 contractors in calendar year 1987,<sup>456</sup> it appears likely the trend, while slowing, has not yet peaked.

Another factor not expressly evident from these figures is the increased use of fact-based suspensions and debarments. While most suspensions and debarments are still based on indictments and convictions,<sup>457</sup> GSA, the Defense Logistics Agency, and the Army process substantial numbers of fact-based suspensions and debarments.<sup>458</sup> These actions are time consuming and it is the author's experience that in the Army the factor limiting the number of fact-based suspensions and debarments is not the number of cases ripe for action, but the number of personnel available to process those actions. With over 500 open cases within the Army's Procurement Fraud Division,<sup>459</sup> it is likely that, at least in the Army, a lack of appropriate personnel continues to be the major limitation on the number of fact-based suspensions or debarments.

## JUDICIAL STANDARD OF REVIEW

As can be expected, the increase in the number of suspensions and debarments, and the greater use of fact-based actions, has not gone unchallenged in the courts. These actions, as a percentage of total suspensions and debarments, have been minimal.<sup>460</sup> Nevertheless, published opinions in the area would lead one to believe that such suits are even less prevalent than they really are. As most suspension and debarment suits are injunction proceedings, and because courts are generally hesitant to publish opinions in fields in which they do not feel comfortable, many suspension and debarment decisions are never published. Despite this relative sparsity of judicial authority, the cases clearly have found, at least on the appellate level, that the government procedures, if followed fully, provide sufficient due process.

## THE CONTRACTOR'S DUE PROCESS RIGHTS

Old Dominion held "that a liberty interest recognized by the Fifth Amendment is implicated" in the decision that a contractor is not responsible due to a lack of integrity.<sup>461</sup> The court's discussion leading up to this holding found that a governmental decision of nonresponsibility, based on integrity issues, was the type of case the Supreme Court intended to reach in Wisconsin v. Constantineau<sup>462</sup> and Board of Education v. Roth.<sup>463</sup> In those cases the Supreme Court stated "where a person's good name, reputation, honor, or



integrity is at stake because of what the Government is doing to him, notice and an opportunity to be heard are essential.<sup>464</sup>" However, the Supreme Court had held in Paul v. Davis,<sup>465</sup> that without some tangible loss, like the loss of employment, injury to reputation was insufficient to bring constitutional due process rights into play.<sup>466</sup> The Old Dominion court stated that "it is precisely the 'accompanying loss of government employment' and the 'foreclosure from other employment opportunity' which is the injury resulting from the Government defamation in this case."<sup>467</sup>

Having found a constitutionally protected interest and a violation of that interest, the next inquiry was exactly what kind of process the contractor was due. The Supreme Court has stated, "it has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands."<sup>468</sup> In determining what process is due in governmental administrative actions the courts look to the criteria set out in Mathews v. Eldridge.<sup>469</sup> Mathews required that in administrative proceedings the court should generally look to:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally the Government's interest, including the function involved and the fiscal and ad-

ministrative burdens that the additional or substitute procedural requirements would entail.<sup>470</sup>

#### DUE PROCESS APPLIED

The first suspension or debarment case<sup>471</sup> arising after Old Dominion was Transco. The case recognized Old Dominion and the constitutionally protected liberty interest,<sup>472</sup> and applied an abbreviated Mathews test. The Transco court evaluated the government's interests as getting the value of its purchase and providing security services at "important government facilities."<sup>473</sup> Transco's concern was a "liberty interest not to be denied the opportunity to bid on, and be awarded government contracts while under the cloud of a charge of fraud."<sup>474</sup> The court assessed the adequacy of the procedures against these interests stating:

[t]he regulations attempt to accommodate these conflicting interests by requiring the decision of a top level administrator in accordance with specifically articulated standards before the suspension may be issued and permitting the suspended bidder to submit information and argument in opposition to suspension. Thus the risk of erroneous deprivation of [Transco's] . . . interest is slight.<sup>475</sup>

The Transco court thereby found the procedure afforded the required due process, but went on to find that the

application of the procedure in the case deficient because the notice was not sufficiently specific.<sup>476</sup>

The next case<sup>477</sup> to apply the Mathews test was Electro-Methods, Inc. v. United States.<sup>478</sup> Electro-Methods, Incorporated, (Electro) was suspended by the Air Force on August 2, 1983, based on affidavits of two Federal Bureau of Investigation (FBI) agents used to obtain search warrants in the case. The Claims Court<sup>479</sup> noted that 85% of Electro's business was with the government and stated Electro had "a right to procedural due process for protection of its property and liberty interests."<sup>480</sup> It mentioned Mathews, Cafeteria Workers, and Morrissey v. Brewer<sup>481</sup> and then found the suspension defective because the regulations failed to set a specified time in which the contractor would be heard after the suspension was imposed.<sup>482</sup> No analysis was made, only the conclusion that because the suspension was effective on August 2, and the decision to provide a hearing was made on September 25, "the notice was inadequate to protect . . . [Electro's] property and liberty interests because it failed to set a fixed time for a hearing . . . ."<sup>483</sup> This was despite the fact that Electro had obtained copies of the FBI affidavits in June, had initiated meetings with the Air Force in July, and had submitted materials to the Air Force throughout July; all of which was considered by the Air Force before a suspension was imposed.<sup>484</sup>

The circuit court "not[ing] with approval the trial court's exposition of the concept of due process," reviewed the facts and concluded that Electro's

due process rights had been satisfied.<sup>485</sup> The court based its decision on the following facts: 1) Electro submitted materials and information to and met with Air Force personnel before the suspension was imposed; 2) Electro made a detailed response to the suspension notice; 3) Electro declined to make an oral presentation of matters in opposition during the first 30 days of the suspension; 4) the Air Force agreed that a genuine dispute over a material fact existed and agreed to a fact-finding proceeding, after DOJ coordination, with the reservation that it would not include cross-examination of the FBI agents; and 5) Electro had all the information upon which the Air Force suspension was based. The court stated:

The concept of due process cannot be extended so far . . . as to mandate that a 'meaningful' hearing include permitting the contractor to subpoena and examine FBI agents involved in an on-going criminal investigation, as well as other Government and industry officials, to prove its case. . . . The delicately balanced scales of due process should not tip so far in favor of the contractor.<sup>486</sup>

Another case occurring at about the same time was ATL, Inc. v. United States.<sup>487</sup> ATL, Incorporated, (ATL) was low bidder on four Navy contracts in March and April 1983.<sup>488</sup> When the contracts were not awarded by July 6, 1983, ATL filed suit in the Claims Court alleging a de facto debarment and requesting a temporary restraining order, temporary and permanent

injunctions, and declaratory judgment.<sup>489</sup> The court denied the request for the temporary restraining order and set trial on the other requests for July 18, 1983.<sup>490</sup> On July 15, 1983, the Navy suspended ATL and promptly awarded three of the contracts to other bidders.<sup>491</sup> The Claims Court issued a preliminary injunction against the Navy on July 18, 1983.<sup>492</sup>

In its August 9, 1983, decision the Claims Court made an extensive review of the suspension and debarment case law.<sup>493</sup> Applying the Mathews criteria to the case, the Claims Court found ATL's interest "substantial."<sup>494</sup> This was based on the fact that ATL was a small business "wholly dependent on government work" and that the Navy had "deprived . . . [ATL] of a right to receive four Navy contracts with a value of over \$5.5 million . . . ."<sup>495</sup> The court then found the risk of the procedures resulting in a mistake to be very high.<sup>496</sup> The court's basis for that conclusion was that if the testimony of ATL's president was believed ATL might be exculpated of the charges.<sup>497</sup> The court's opinion was that "[t]he possibility of error in any ex parte accusatory proceeding and the price that the contractor will have to pay therefore in any event indicate that procedural safeguards are necessary to protect the interests of threatened contractors."<sup>498</sup> Completing the Mathews test, the court then found that the government's only real burden would be "conducting a criminal prosecution in which the evidence is known to the accused."<sup>499</sup> Noting that discovery in civil cases had eliminated pretrial secrecy and that the criminal rules were under criticism the court con-

cluded, "it is difficult to conclude that the government's interest in keeping evidence secret, necessarily outweighs the more serious effect which such secrecy may have upon the contractor's right to know the charges against him when he is deprived of his livelihood.<sup>500</sup>"

Despite this rather one-sided application of the Mathews test, the Claims Court did not find the suspension to be violative of due process. The notice did not particularly offend the court's concept of due process as it found only one of the nine charges insufficiently specific.<sup>501</sup> Further, the court stated it would not presume that the Navy would fail to comply with a reasonable request for more information so ATL could prepare a meaningful opposition to the suspension.<sup>502</sup> Consequently, the court granted temporary injunctions against the Navy on the award or performance of the contracts, but it did not declare the suspension to be invalid and allowed the suspension procedure to continue.<sup>503</sup>

On January 6, 1984, the Claims Court revisited ATL once again.<sup>504</sup> The Navy had originally suspended ATL on nine charges.<sup>505</sup> Based on the previous Claims Court opinion, ATL had requested more specific information regarding each charge and a hearing.<sup>506</sup> The Navy wrote back that the regulations only required it to provide sufficient evidence to put ATL on notice, which the Navy had done, and that DOJ had advised that fact-finding should not be permitted.<sup>507</sup> While the Navy did provide ATL with some documents, it did not provide them with everything requested.<sup>508</sup> On September 7,

1983, a presentation of matters in opposition was held at which the only witnesses were ATL personnel.<sup>509</sup> Based on that presentation the suspension was continued, although only two of the original nine charges were upheld by the Navy suspending official.<sup>510</sup>

Upon reviewing the Navy's decision the Claims Court reviewed the DAR provisions on suspension (essentially the present FAR provisions) and the suspension and debarment precedents in great detail.<sup>511</sup> It concluded that Horne Brothers and Transco required more specific information as to one of the two charges.<sup>512</sup> However, the court then found that, "in the light of other controlling decisions not specifically dealing with [the] suspension of government contractors," due process required that ATL be provided "an opportunity to confront its accusers and cross-examine witnesses and a neutral tribunal."<sup>513</sup> The court then reiterated its earlier analysis of the three Mathews factors,<sup>514</sup> but further emphasized the importance of being able to cross-examine adverse witnesses<sup>515</sup> and the court's opinion that the fact-finding rights provided by the regulation were illusory in a suspension proceeding because they could be so easily avoided.<sup>516</sup> Finally, the court decided that due process required an impartial hearing authority and required any new hearing would have to be before a committee which included no one who was previously involved in "preferring the charges."<sup>517</sup>

The government appealed.<sup>518</sup> The circuit court, citing Electro-Methods, first pointed out that due process is "determined not on the validity of the

general regulations, but on the facts specifically involved.<sup>519</sup> Noting the Mathews factors and the Claims Court's analysis, the court then re-evaluated the private interest prong of the test,<sup>520</sup> stating:

in suspension cases it is recognized that, although a citizen has no right to a Government contract, and a bidder has no constitutionally protected property interest in such a contract, a bidder does have a liberty interest at stake, where the suspension is based on charges of fraud and dishonesty. Accordingly, the minimum requirements of due process come into play.<sup>521</sup>

The court emphasized in a footnote that ATL's only protected interest was a liberty interest and that ATL was not prevented from pursuing commercial work.<sup>522</sup> The fact that ATL had specialized in government work did not garner any sympathy. The court said that "[a] small business choosing to put nearly all its eggs in one Government contracts basket must be expected to bear some responsibility for the risk that that basket could, as a result of the contractor's misconduct, temporarily or even permanently be snatched away . . .  
.<sup>523</sup>"

Against this much weakened private interest the court found the "Government's interest in protecting an ongoing criminal investigation is considerable."<sup>524</sup> Looking to the possibility of "an erroneous deprivation of the contractor's interest" the court believed that the procedures required by its opinion would be enough



to protect ATL's interest, even though less stringent than the procedures required by the Claims Court.<sup>525</sup>

Reviewing the areas where the Claims Court found a lack of due process the court: 1) held that the Navy's initial notice to ATL was "sufficiently specific," noting that a requirement to be specific did not require the "wholesale production of documents" when a criminal prosecution was pending;<sup>526</sup> 2) reversed the requirement for an adversary hearing with the cross-examination of witnesses;<sup>527</sup> and 3) reversed the requirement for a neutral forum, finding that the decisionmaking process provided by the Navy satisfied the process due ATL.<sup>528</sup> The only holding of the Claims Court affirmed by the circuit court was the finding that the "Navy's failure to provide further information" was violative of due process.<sup>529</sup> Reviewing the record, the court unfavorably compared the Navy's "secretive attitude" with the Air Force's behavior in Electro-Methods.<sup>530</sup> The court particularly noted some records requested by ATL, which the Navy refused to release, that the court believed no one could seriously contend would harm the criminal investigation.<sup>531</sup> Consequently, the case was remanded for a rehearing by the Navy to be held after the Navy released all evidence which was reasonably releasable.<sup>532</sup>

Subsequent cases have emphasized certain areas of the suspension or debarment processes, but if the case has questioned the adequacy of the due process provided by the regulations, as opposed to the application of the regulations, most courts have explicitly<sup>533</sup> or implicitly<sup>534</sup> applied the Mathews factors in reaching

their decisions that the suspension and debarment provisions of the FAR provide adequate due process if properly followed.<sup>535</sup>

#### SUGGESTED EMPHASIS IN JUDICIAL REVIEW

The development of the suspension and debarment standards and procedures and the cases that have reviewed those standards and procedures result in several solidly based conclusions:

1. the legislative branch of the government endorses the use of suspensions and procurement debarments by the executive agencies, as long as minimal concepts of fairness are applied;<sup>536</sup>

2. the courts agree that the government has the inherent power to suspend or debar contractors, as long as the procedures used to suspend and debar adequately safeguard the contractor's protected rights;<sup>537</sup>

3. the contractor's only constitutionally protected right in a debarment or suspension proceeding is a liberty interest in its reputation;<sup>538</sup> and

4. the test to apply in determining whether an adequate level of process has been provided by the government in making the decision to deprive a contractor of that liberty interest is the tripartite test of Mathews.<sup>539</sup>

The courts have ultimately decided in every case that if the procedures are followed the regulations provide sufficient due process. The author suggests, however, that in applying the Mathews criteria the courts have neglected to fully explore the government's

interest in the suspension and debarment procedures. This failure extends to more than just enumerating the government's immediate interests, it arises out of a fundamental misperception of the interests underlying the relationship of the government, as purchaser, and its contractors.

The Supreme Court stated in Mathews that in reviewing the government's interests the courts were to specifically consider "the function involved . . . .<sup>540</sup>" The function involved in the suspension and debarment procedures is the contracting power of the United States. For purposes herein, it is suggested that this function entails two considerations. First, the government as a purchaser in the open marketplace expects its contractors to deal with it honestly and fairly, but if there is evidence that a contractor deals dishonestly or unfairly the government should have the right of any consumer to stop buying from that contractor.<sup>541</sup> Second, the government as purchaser enters the marketplace in a position that is more analogous to a trustee than to an individual or business because the government is spending public funds for which there is a duty to spend as wisely as possible.<sup>542</sup>

There is also a fundamental difference between the government as purchaser and the government as sovereign. In its role as a purchaser the interaction between the government and the contractors is voluntary, no one forces a contractor to contract with the government. In its role as sovereign the interaction between the government and the other party is usually

involuntary in that either the other party would just as soon - not have the interaction at all<sup>543</sup> or the nature of the situation is such that there is no real alternative to going to the sovereign.<sup>544</sup>

The Supreme Court has indicated that it recognizes the inherent difference between the government as sovereign and the government as a purchaser. In Perkins v. Lukens Steel Co.,<sup>545</sup> the Court stated that, "[l]ike private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases."<sup>546</sup> While the broad sweep of that language has eroded with time, the Supreme Court quoted that same passage in 1980 stating, "[w]hile acknowledging that there may be limits on this sweepingly phrased principle, we cannot ignore the similarities of private businesses and public entities when they function in the marketplace."<sup>547</sup>

In evaluating the government's interests in the suspension and debarment provisions of the FAR the courts have never explicitly indicated a recognition of the fundamental difference of the government as purchaser versus the government as sovereign, despite the fact that Mathews explicitly indicates function is a factor in the equation. Some cases, especially more recent ones, appear to indirectly recognize this difference as the governmental interests found by the court include interests of the government as a purchaser.<sup>548</sup> Turning to the government interests found by the courts, the enumeration is relatively poor as

most cases list only one or two governmental interests being considered by the court.<sup>549</sup> This is probably in part because the courts needed no more to arrive at their decision, but it should be noted that the list is not as limited as a review of one or two cases might indicate.

The application of Mathews making full allowance for the governmental function being considered (contracting) and a complete enumeration of the government interests involved in the decision should heavily weight the balancing of interests required by Mathews in favor of the government. This is not to say, however, that the government should be allowed to make such decisions in an arbitrary or capricious manner. While the open marketplace allows the buyer virtually unrestricted latitude in choosing whom he will do business with,<sup>550</sup> the government as sovereign owes a duty to the public and to its contractors to make rational choices in choosing to discontinue business dealings. However, once the government's decision has been shown to be rationally based and the contractor has been provided notice and an opportunity to correct mistakes the courts should be very hesitant to step in and replace the agency's business decision that a contractor is not a trustworthy business partner with the court's opinion.

#### ALLEGATIONS OF INADEQUATE DUE PROCESS

Much of the criticism of the FAR provisions regarding suspension and debarment is based upon a

desire within the bar to turn the process of suspension and debarment into a quasi-judicial procedure.<sup>551</sup> Such proposals have received only limited support within the written commentary, generally in the area of having a third party, such as a Contract Appeals Board or Administrative Law Judge make the debarment or suspension decision.<sup>552</sup> The rationale advanced for having a third party make the suspension and debarment decision is generally the idea that the debarring or suspending official, if a member of the agency proposing the suspension or debarment of a contractor, cannot or will not make a fair decision on the suspension or debarment.<sup>553</sup> Such a contention was specifically considered under the Mathews test in ATL and the court rejected any requirement for a neutral tribunal in suspension and debarment decisions.<sup>554</sup> As long as the procedures and practice of the agencies maintain the independence and impartiality of the suspending or debarring official there should be no difficulty in meeting the test under Mathews.

#### CONCLUSION

The government decided over 200 years ago to obtain many of its needs by purchasing them from the private sector.<sup>555</sup> During the last 60 years there has been an evolution of the standards and procedures which have become the present suspension and debarment provisions of the FAR. These procedures and standards have undergone judicial scrutiny and have been found to meet both constitutional notions of due process and

standards of basic fairness. Assuming that the application, or any amendment, of those standards and procedures bears a rational basis to the underlying function and the legitimate interests of the government, those standards and procedures should continue to withstand judicial scrutiny.

The use of government contracting will continue to grow as the process of contracting out activities once performed by government resources is achieved.<sup>556</sup> It is incongruous that as the government's use of the free enterprise system is being optimized it should deny or seriously curtail its inherent ability to prevent contracts from being awarded to contractors engaged in illegal or improper conduct.

Suspension and debarment are effective tools by which government can protect itself from contractors who are not responsible.<sup>557</sup> Used responsibly and in accordance with the government's legitimate interests it will continue to be an effective method by which to protect public funds and enhance the integrity of the public contracting process.

1. See Kabeiseman, Contractor Debarment and Suspension - A Government Perspective, 19 Pub. Cont. Newsl. 3 (Spring 1984).

2. Comment, Moving Toward a Better-Defined Standard of Public Interest in Administrative Decisions to Suspend Government Contractors, 36 Am. U.L. Rev. 693 (Spring 1987).

3. J. Cibinic & R. Nash, Formation of Government Contracts 252 (2d ed. 1986). Earlier authorities used the term "statutory debarment" instead of "inducement debarment" and "administrative debarment" instead of "procurement debarment." Gantt & Panzer, The Government Blacklist: Debarment and Suspension of Bidders on Government Contracts, 25 Geo. Wash. L. Rev. 175, 178, 181 (1957). It appears that changes in the terminology began in 1976 when the term inducement debarment was used instead of statutory debarment, and the term nonresponsibility debarment was used instead of administrative debarment. Steadman, "Banned in Boston - and Birmingham and Boise and . . .": Due Process in the Debarment and Suspension of Government Contractors, 27 Hastings L.J. 793, 796-803 (1976).

4. One authority has stated that "about 80 laws" provide for debarment. Dembling, Debarment and Suspension, 78-6 The Gov't Contractor Briefing Papers 1 (Dec. 1978). The most extensive listing of such statutes found by this author was slightly over 60 statutes. United States General Services Administra-



tion, Consolidated List of Debarred, Suspended, and Ineligible Contractors, 4-6 (Jan. 1988).

5. Steadman, supra note 3, at 799. The federal government has long used its contracting power as a vehicle to advance social policies having little or nothing to do with the direct needs being fulfilled by the contract. Leventhal, Public Contracts and Administrative Law, 52 A.B.A.J. 35, 36 (1986). See Whelan & Pearson, Underlying Values in Government Contracts, 10 J. Pub. Law 298 (1962).

6. See Doyle & Bachman, Debarment After Gonzalez v. Freeman, 16 Pub. Cont. Newsl. 2, 9 (May 1981).

7. Id. at 10 (note their attribution of this position to the Senate Subcommittee on Administrative Practice and Procedure is incorrect, the position is that of the Comptroller General, cited below). See Federal Acquisition Regulation 9.402(a), 9.406-2(c), and 9.407-2(c) (1987) [hereinafter FAR] (9.402(a) provides that suspension and debarment effectuate the policy of awarding contracts only to responsible contractors, the other two sections state that the action may be taken for any "other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor." (all emphasis added)). See also Ms. Comp. Gen. B-139720, Jan. 6, 1960, reprinted in S. Doc. No. 24, 88th Cong., 1st Sess. 297, 298-302 (1963) (The Comptroller General discusses inducement and procurement debarments at

length and clearly supports the position stated in the quoted FAR provisions).

8. Armed Services Procurement Act of 1947, ch. 65, sec. 3(b), 62 Stat. 21 (1948). For an analysis of the "responsible bidder" standard in this legislation, see Van Cleve, The Blacklisting of Bidders by the Military Services, 13-15 (April 1958) (unpublished thesis on file at the library of The Judge Advocate General's School, U.S. Army).

9. Federal Property and Administrative Services Act of 1949, ch. 288, sec. 303(b), 63 Stat. 377 (1949).

10. 98 Stat. 1175 (1984) (amending parts of 10 U.S.C. and 41 U.S.C.).

11. 10 U.S.C. secs. 2305(b)(3), 2305(b)(4)(B), and 2305(b)(4)(D) (1982 Supp. III 1985) and 41 U.S.C. secs. 253b(c), 253b(d)(2), and 253b(d)(4) (1982 Supp. III 1985).

12. Steadman, supra note 3, at 796.

13. J. Nagle, Federal Procurement Regulations-Policy, Practice and Procedures 13 (1987).

14. Id. at 14. Morris contracted pursuant to a specific grant of authority from the Continental Congress, albeit received late, and utilized the concepts of advertising contracts, opening sealed proposals on a stated date, and accepting the most

beneficial terms. Id. at 15-18.

15. Id. at 16.

16. Id.

17. O'Brien v. Carney, 6 F. Supp. 761, 762 (D. Mass. 1934).

18. S. Rep. No. 571, 80th Cong., 1st Sess. 25 (1947).

19. To be determined responsible, a prospective contractor must:
- (a) Have adequate financial resources to perform the contract, or the ability to obtain them (see 9.104-3(b));
  - (b) Be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and government business commitments;
  - (c) Have a satisfactory performance record (see 9.104-3(c));
  - (d) Have a satisfactory record of integrity and business ethics;
  - (e) Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them (including, as appropriate, such elements of production control procedures, property control systems, and quality

assurance measures applicable to materials to be-produced or services to be performed by the prospective contractor and subcontractors)(see 9.104-3(b));

(f) Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them (see 9.104-3(b)); and

(g) Be otherwise qualified and eligible to receive an award under applicable laws and regulations.

FAR 9.104-1.

20. FAR 9.103(b). It is the author's experience that, despite this FAR provision, generally a determination of responsibility occurs when information is lacking. Nonresponsibility determinations will usually be made only when problems are severe and can be positively documented.

21. See Cibinic & Nash, supra note 3, at 203, 224-36.

22. The exception being for small businesses where a failure to meet this first hurdle may be overcome by a Certificate of Competency from the Small Business Administration. FAR 9.104-3(e).

23. See 42 C.F.R. ch. 2, sec. 9.470 (1987) [hereinafter DFARS] (for a list of authorized suspension and debarment authorities within the Department of Defense (DOD), all are senior military or civilian personnel).

24. FAR 9.406-1(c), 9.407-1(d).

25. FAR 9.405(a) (exceptions for compelling needs are provided for at FAR 9.405-2, 9.406-1(c), 9.407-1(d)). See also 10 U.S.C. 2393 (1982) (which requires DOD to honor suspensions and debarments of other federal agencies).

26. See infra note 19.

27. It may be argued that the other responsibility standards may be used as a basis for suspension or debarment under the catchall suspension and debarment provisions of FAR 9.406-2(c) and 9.407-2(c). However, no cases have been found in which the failure to meet the other responsibility standards were directly used as a basis for suspension or debarment under the catchall provisions.

28. FAR 9.104-1(c), 9.406-2(b).

29. FAR 9.104-1(d), 9.406-2(a), 9.407-2(a).

30. See infra appendix A.

31. See infra appendix B.

32. See infra appendix C.

33. But see AFARS 9.490(f).

34. FAR 9.403.

35. President's Blue Ribbon Commission on Defense Management, Conduct and Accountability a Report to the President, 30 n.20 (June 1986) [hereinafter President's Commission].

36. FAR 9.405(a), 9.405-1(b), 9.406-3(c)(7).

37. See FAR 9.406-3(c)(7).

38. Id. Giving government-wide effect to proposed debarments and making the effect the same as for a suspension or debarment is under consideration. 52 Fed. Reg. 28,641 (1987).

39. FAR 9.406-3(c)(7).

40. FAR 9.407-1(b).

41. FAR 9.407-4(a), 9.407-1.

42. FAR 9.407-2(a).

43. Id.

44. FAR 9.406-2(c).

45. Id.

46. FAR 9.407-2(b).

47. FAR 9.407-4(a).
48. FAR 9.407-4(b).
49. FAR 9.406-2(a).
50. FAR 9.406-2(b).
51. FAR 9.406-2(c).
52. FAR 9.406-3(d)(3).
53. FAR 9.406-4.
54. Id.
55. FAR 9.402(b).
56. FAR 9.406-1(a) (emphasis in original).
57. Id.
58. FAR 9.406-3(b), 9.407-3(b).
59. Id.
60. Id.
61. FAR 9.406-3(c)(2), 9.407-3(c)(1).
62. FAR 9.407-3(c)(1).

63. AFARS 9.493(b).

64. Id.

65. FAR 9.403.

66. See FAR 9.406-3(b)(2), 9.406-3(d)(1), 9.406-3(d)(3).

67. FAR 9.406-3(b)(2), 9.407-3(b)(2).

68. FAR 9.407-3(b)(2).

69. For slightly dated reviews of some of these procedures, see Excerpts from the DOD Inspector General Review of Suspension and Debarment within the Department of Defense, 42 Fed. Cont. Rep. (BNA) 763 (Oct. 29, 1984), and Army's Debarment Procedures Highlight Evidentiary, Factfinding Standards, 41 Fed. Cont. Rep. (BNA) 867 (May 14, 1984).

70. AFARS 9.493(c), 9.493(d). The Army suspension and debarment procedures were first published in 1984 and remain unchanged. See Army's Debarment Procedures Highlight Evidentiary, Factfinding Standards, 41 Fed. Cont. Rep. (BNA) 867 (May 14, 1984).

71. AFARS 9.493(d)(1).

72. AFARS 9.493(d)(2).



73. Id.

74. The Army practice is that attorneys of the Procurement Fraud Division of the Office of The Judge Advocate General monitor suspected contract fraud cases until they feel the information supports a proposed debarment or suspension. They prepare a record from the materials available to them and based on that record make a recommendation, by memorandum, to the suspending and debarring authority. If the suspending and debarring authority takes action it is based solely on that memorandum and record which become the administrative record which, in the normal case, is provided in full to the contractor. The government attorney may have much information in his files, never seen by the suspending and debarring authority, which only becomes relevant when it contradicts information submitted by the contractor in his submission in opposition.

75. AFARS 9.493(e).

76. One of these two fact-findings was conducted on behalf of Contract Fraud Branch, Litigation Division by the author.

77. The need for such lists would only arise as the number of contracting officers and contractors rose to such levels, or when transportation and communications became so advanced that word of mouth and reputation could no longer suffice to keep contracting officers advised of the responsibility of their contractors.

Consequently, the Civil War would seem to be a fertile field for such research.

78. 7 Comp. Gen. 547 (1928).

79. Id.

80. Id. at 547-48.

81. 9 Comp. Gen. 23 (1929).

82. Id.

83. Id.

84. Id. at 23-24.

85. 14 Comp. Gen. 313 (1934); 15 Comp. Gen. 286 (1935).

86. 47 Stat. 1520 (1933) (codified as amended at 41 U.S.C. secs. 10a to 10d (1982)).

87. Id. at sec. 10b(b).

88. 49 Stat. 1011 (1935) (codified as amended at 40 U.S.C. sec. 276a (1982)).

89. Id. at secs. 276a-2(a).

90. 49 Stat. 2036 (1935) (codified as amended at 41 U.S.C. secs. 35 through 45 (1982 & Supp. III 1985)).

91. Id. sec. 37.

92. Miller, Administrative Discretion in the Award of Federal Contracts, 53 Mich. L. Rev. 781, 795 n.54, 802, 810 n.92 (1955).

93. Id.; Gantt & Panzer, supra note 3; Comment, Blacklisted Contractors and the Question of Standing to Sue, 56 Nw. U.L. Rev. 811, 814 (Jan.-Feb. 1962); Administrative Conference of the United States, Committee on Adjudication of Claims, Debarment and Suspension of Persons from Government Contracting and Federally Assisted Construction Work, 274 n.5 (1962), reprinted in S. Doc. No. 24, 88th Cong., 1st Sess., 265-95 (1963) [hereinafter ACUS] (all page citations to the senate document).

94. Attorney General's Committee on Administrative Procedure, The Division of Public Contracts, Department of Labor, 3 (1939), reprinted in S. Doc. No. 186, 76th Cong., 3d Sess., 1-34 (1940) (all page citations to the senate document).

95. Id. at 2.

96. Id. at 3-4.

97. Id. at 3. The committee noted that such a provision had been introduced before the Senate, approved, and was before the House. Id. at 3 n.3. A review of the act, as codified, indicates no such

amendment has been enacted.

98. Id. at 23.

99. Title page, C.F.R. (1939).

100. 10 C.F.R. sec. 81.13(a) (1938); 34 C.F.R. sec. 8.1043(a) (1938).

101. The Army regulation used the term "responsible bidder," which looked to prior performance, among other factors. 10 U.S.C. sec. 81.13(a) (1938). The Navy regulation did not use the term "responsible bidder," although the language of the regulation infers some such standard. "While purchases . . . need not be made from the lowest bidder, yet other things being equal, the lowest bid, if more than one has been obtained, shall be accepted." 34 U.S.C. sec. 8.1044(b) (1938). See also 34 U.S.C. sec. 8.1044(f) (1938).

102. 10 U.S.C. sec. 81.13(g)(4) (Supp. 1941).

103. Printed in 1944, the supplement covered the period up to June 1, 1943. Title page, C.F.R. (Supp. 1944). Apparently, no supplement was produced in 1942, possibly because of the war effort.

104. 10 C.F.R. sec. 81.226(a) (Supp. 1944).

105. Id. at sec. 81.226(a)(3).

106. Id. at sec. 81.226(c)(1).
107. Id.
108. Id. at sec. 81.226(c)(2).
109. 7 Comp. Gen. 547 (1928); 14 Comp. Gen. 313, 314 (1934); 15 Comp. Gen. 286, 287 (1935).
110. 10 C.F.R. sec. 802.216 (Supp. 1946).
111. See id. at sec. 802.216-3(a)(2).
112. Id. at sec. 802.216-3(a)(2).
113. Id. at sec. 802.216-1(d).
114. 10 C.F.R. sec. 802.108 (Supp. 1947).
115. 34 C.F.R. sec. 31.133 (Supp. 1947).
116. Id.
117. Id. at secs. 31.133(c)(1)-(3).
118. Id. at sec. 31.133(d)(4).
119. 32 C.F.R. ch. IV (1949).
120. Id. at sec. 400.303.

121. Id. at sec. 400.303(d).
122. Id. at sec. 400.303-2.
123. Id. at sec. 400.303-1.
124. 32 U.S.C. sec. 1000.103 (Supp. 1950).
125. Id. at sec. 1000.303.
126. Id. at sec. 1001.303(a)(4).
127. Id.
128. Id. at sec. 1000.303(a)(5).
129. Id. at secs. 1000.303(b)(4), 1000.303(b)(5), 1000.303(d)(2).
130. Id. at sec. 1000.303(d)(2).
131. 16 Fed. Reg. 3,990 (1951) (codified at 32 C.F.R. sec. 590.303 (1951)).
132. 32 C.F.R. sec. 590.303(a) (1951).
133. Id. at sec. 590.303(b).
134. Id. at sec. 590.303(c).
135. Id. at sec. 590.303(b)(1).

136. Id. at sec. 590.303(b)(7)(v).

137. Id.

138. Id. at sec. 503.303(b)(12).

139. Id.

140. Id.

141. 7 Comp. Gen. 547 (1928). The portion quoted in the regulation was quoted infra p. 13, with the exception that the last sentence quoted infra was not quoted in the regulation.

142. 32 C.F.R. sec. 590.303(c)(1) (1951).

143. Participation of Small Business in Military Procurement: Hearings Before a Subcomm. of the Senate Select Comm. on Small Business, 83d Cong., 1st Sess. (1953).

144. Id. at 73 (testimony of Mr. Pearson).

145. Id.

146. Id.

147. Id. at 76 (testimony of Lieutenant Colonel Coward, Judge Advocate General's Corps).

148. Id. at 77.

149. 32 C.F.R. secs. 590.303-1(d), 590.303-2(b), 490.303-4 (Supp. 1952).

150. Id. at sec. 590.303-1(1).

151. 18 Fed. Reg. 2,583 (1950) (codified as amended at 32 C.F.R. sec. 400.600 (Supp. 1954)).

152. 18 Fed. Reg. 5,031 (1953) (codified at 32 C.F.R. sec. 400.600 (Supp. 1954)).

153. See Ms. Comp. Gen. B-125183 (Nov. 23, 1955) (the Comptroller General references an earlier opinion, Ms. Comp. Gen. B-112861 (Nov. 25, 1952), "[i]n consequence of . . . [which] there was included in the . . . [ASPR] on March 16, 1953, section 1, part 6," the provisions on debarment).

154. 32 C.F.R. sec. 400.604-1(a) (Supp. 1954).

155. Id.

156. Id. This was amended in 1954, so that the contractor only had to provide notification that his conviction had been reversed to get the debarment lifted. 32 C.F.R. sec. 1.604-1(a)(2) (1954).

157. 32 C.F.R. sec. 400.604-1 (Supp. 1953).



158. Id. at sec. 400.604-1(b)(1).
159. Id.
160. Id. at sec. 400.604-1(b)(2).
161. Id. at sec. 400.604-1(b)(3).
162. Id. at sec. 400.604-1(b)(4).
163. Id. at sec. 400.604-2.
164. Id. at sec. 400.604-3(a).
165. Id. at sec. 400.604-3(b). This requirement, initiated in 1928, was eliminated by the Comptroller General on July 31, 1954. 33 Comp. Gen. 682 (1953).
166. 32 C.F.R. sec. 400.604-3(b) (Supp. 1954).
167. Id. at sec. 400.605.
168. Id.
169. Id. at sec. 400.605-1.
170. Id. at sec. 400.605-3(c).
171. Id. at sec. 400.603-1(d).
172. See id. at secs. 590.303 to 590.303-6.

173. Id. at sec. 590.303-2(b).
174. Id. at secs. 590.303-3(a), 590.303-4(a).
175. 32 C.F.R. secs. 1.604, 1.605-1 (1954).
176. Id. at sec. 1.604-3(a)(3).
177. Staff of the Subcomm. on Defense Activities of the Comm. on Armed Services H.R., 83d Cong., 2d Sess., Investigation of Possible Fraud in Construction of Ordnance Facilities, Corozal, C.Z. 1-2 (Comm. Print 1954).
178. Id. at 3-6.
179. Id. at 5.
180. Id.
181. Id. at 8.
182. Id.
183. Staff of the Subcomm. for Special Investigations of the Comm. on Armed Services H.R., 84th Cong., 2d Sess., Study of Armed Services Procurement Regulations, Sections 1-605 and 2-302 and Navy Procurement Directive 3-002.1 (Comm. Print 1956) [hereinafter Staff].
184. Id. at 3202 (statement of congressman Hebert).

185. Id. at 3217 (statement of congressman Hess).
186. Id. at 3213.
187. See id. at 3201-44.
188. Id. at 3228-29 and 3236 (testimony of Mr. Welfare), and 3240-41 (testimony of Mr. Fisher).
189. Id. at 3244 (testimony of Brigadier General William Ghormley).
190. 32 C.F.R. sec. 1.605-4(a) (Supp. 1957).
191. Id. at secs. 1.605-4(d), 1.605-4(b).
192. Id. at sec. 1.605-4.
193. Staff, supra note 183, at 3317.
194. S. Rep. No. 1380, 84th Cong., 2d Sess. (1956).
195. Id. at 2, 8.
196. Id. at 9.
197. Ms. Comp. Gen. B-125183 (Mar. 1, 1956).
198. Id.
199. Id.

200. Ms. Comp. Gen. B-125183 (Nov. 23, 1955).
201. Ms. Comp. Gen. B-125183 (Mar. 1, 1956).
202. 32 C.F.R. sec. 1.604-1(b)(2) (1954).
203. Ms. Comp. Gen. B-125183 (Nov. 23, 1955; Mar. 1, 1956; Apr. 13, 1956; May 8, 1956).
204. 249 F.2d 111 (D.C. Cir. 1957), cert. denied, 355 U.S. 939 (1958).
205. Discussed more fully infra pp. 39-42.
206. Id. at 112.
207. Id.
208. The court specifically did not address the question of whether Schlesinger's refusal to provide information to Congress could be a basis for his debarment without a regulatory provision covering the situation. Id. at 112 n.4.
209. Id. at 112-13.
210. Textile Procurement in the Military Services: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Government Operations, 84th Cong., 2d Sess., 1759-60 (1956).

211. Id.
212. S. Rep. No. 1166, 85th Cong., 1st Sess., 7 (1957).
213. Id. at 54.
214. Id. at 7, see also id. at 54.
215. Id. at 3-5.
216. Id. at 8.
217. 37 Comp. Gen. 544 (1958). (From the language of the request it is fairly certain the Army did not consent to the award of any subcontract to Schlesinger).
218. Id. at 546.
219. A change has recently been proposed that would amend FAR 9.405(c) so that it would exclude contractors debarred, suspended, or proposed for debarment from any subcontract valued at more than \$25,000 unless a compelling need determination is made allowing the subcontract. 52 Fed. Reg. 28,641 (1987).
220. H.R. Rep. No. 1168, 85th Cong., 1st Sess. (1957).
221. Id. at 26.
222. Id. at 26-28.

223. Id. at 5.

224. 22 Fed. Reg. 8,000 (1957).

225. 32 C.F.R. secs. 1.601, 1.601-3 (Supp. 1958).

226. Id. at sec. 1.604.

227. Id. at sec. 1.604-3(a). It is interesting that the Schlesinger decision characterized the 1955, ASPR provision as, "it calls for a notice to the contractor affording him an opportunity to be heard and invokes a temporary debarment pending that hearing; a favorable decision lifts the temporary debarment." Schlesinger, 249 F.2d at 113 n.5. That characterization is much more akin to the ASPR as amended in 1957, than as it existed in 1955, when Schlesinger was debarred. Whether the court was influenced by the upcoming ASPR amendment, through arguments of counsel, or the amendment influenced by the Schlesinger decision is impossible to say.

228. 32 C.F.R. sec. 1.604-3(a) (Supp. 1958).

229. Id. at secs. 1.604-1(c), 1.605-1(b).

230. Id. at sec. 1.605-1.

231. Id. at sec. 1.604-1(a)(3).

232. 41 C.F.R. secs. 1-1.601 to 1-1.608 (1960). There is no doubt civilian agencies had been previously using debarment procedures as the ASPR had provided since 1953 that the debarment of another executive agency could serve as the basis for a debarment within DOD. 32 C.F.R. sec. 400.604-1(c) (Supp. 1954). See also Ms. Comp. Gen. B-128289 (July 19, 1956) (reviewing a Department of Interior debarment).

233. 41 C.F.R. sec. 1-1.605(b)(6) (1960).

234. 41 C.F.R. subpart 5-1.6 (1962).

235. Id. at sec. 5-1.106-55.

236. Id. at sec. 5-1.606-56.

237. Id.

238. Id. at sec. 5-1.606-55. How widespread such practices were is unknown, but there is evidence of civilian agencies adopting a DOD debarment as early as 1956. See Ms. Comp. Gen. B-127947 (Sep. 10, 1956).

239. 41 C.F.R. sec. 5-1.606-56 (1963).

240. ACUS, supra note 93, at 265-95.

241. Gantt & Panzer, Defense Procurement - Debarment and Suspension of Bidders on Government Contracts and the Administrative Conference of the U.S., 5 B.C. Ind.

& Com. L. Rev. 89, 92 (Fall 1963).

242. ACUS, supra note 93, at 273-74.

243. Id. at 286-91.

244. Id. at 269.

245. Id. at 276.

246. Id. The committee noted approximately 25 DOD cases in which the suspension had existed for over five years. Id.

247. Id. at 276-77.

248. Id. at 281.

249. Id. at 267.

250. Id. at 269.

251. Id. at 270.

252. Id. at 267.

253. Id. at 283.

254. Id.

255. Id. at 267-268 and 286-291.



256. Id. at 267-68.

257. Id. at 268-69.

258. ACUS was established by the president in order to assist the executive departments and agencies improve existing administrative procedures. See Gantt & Panzer, supra note 241, at 90-91.

259. See Perkins v. Lukens Steel Co., 310 U.S. 113 (1940).

260. See Nagle, supra note 13, at 88-158.

261. 290 F.2d 368 (D.C. Cir. 1961).

262. Id. at 370.

263. Id.

264. Id.

265. The contractor lost on the merits.

266. Id. at 370-71.

267. Comment, supra note 93, at 811; ACUS, supra note 93, at 288.

268. 334 F.2d 570 (D.C. Cir. 1964).

269. Gonzalez, 334 F.2d at 572 n.1.

270. The CCC suspended "the Gonzalez Corporation and its officers and affiliates, including Thomas P. Gonzalez and Carmen Gonzalez, Gonzalez and Blanco, J.F. Gonzalez Company, The American Chili Powder Company, and any corporation in which Thomas or Carmen Gonzalez was a partner or officer . . . ." Id. at 572. Except for the criminal conviction, references herein to Gonzalez may mean any or all of these parties.

271. Id.

272. Id. at 577 & n.14.

273. Id. at 579.

274. Id. at 576-77.

275. Id. at 574.

276. Id. at 574-75 (citation omitted).

277. Upgrading Contractor Debarment Procedures, 12 Fed. Cont. Rep. (BNA) K-1 (Sep. 21, 1964); See Note, Administrative Law - Blacklisting of Government Contractors - Procedural Safeguards Required for Validity of Debarment Proceedings, 40 Notre Dame Law. 224 (Feb. 1965); Comment, Administrative Law-Judicial Review of Administrative Debarment of Government Contractor-Contractor's Standing to Sue the Government,

50 Iowa L. Rev. 856 (Spring 1965); and Note, Administrative Law - Government Contracts - Fair Procedures Held Required in Government Contractor Blacklisting, 40 N.Y.U. L. Rev. 804 (Oct 1965).

278. 249 F.2d at 112.

279. Gonzalez, 334 F.2d 577.

280. Id. at 578 n.16 (emphasis added). Based on this comment and the court's recitation of the facts, one must question whether the result might have been very different if the aggrieved contractor had been debarred pursuant to a more developed regulatory scheme such as that in the ASPR.

281. Id. at 579.

282. Gonzalez, 334 F.2d at 580.

283. Id. at 578, 580 n.21.

284. 32 C.F.R. sec. 1.604-2(a) (1965).

285. Id. at secs. 1.604-2(b)(1), 1.605-2(b)(1).

286. Id. at secs. 1.604-2(b)(3), 1.605-2(b)(3) (this ability to impute misconduct was approved by the Comptroller General in 1969, 48 Comp. Gen. 769, 772 (1969)).

287. 32 C.F.R. sec. 1.604-3(a)(3) (1965).
288. Id. at sec. 1.605-2(a).
289. Id. at sec. 1.605-4(a)(1).
290. This fulfilled another recommendation by ACUS that "to the extent practicable" the regulations of the agencies should be uniform. ACUS, supra note 93, at 269.
291. 41 C.F.R. sec. 1-1.605(a) (1965).
292. Id. at sec. 1-1.604(a)(4).
293. Id. at secs. 1-1.604-1(c), 1-1.605-2(b)(1), 1-1.601-1(e).
294. Id. at secs. 1-1.604-1(c)(3), 1.605-2(b)(3).
295. Id. at sec. 1-1.604-1(c)(3).
296. Upgrading Contractor Debarment Procedures, supra note 277, at K-2.
297. 41 C.F.R. sec. 1-1.604-1(a) (1965).
298. Bidders' Qualifications: Granting of Full Hearing Rights in Contractor Debarment Cases is Debated by Agencies, 14 Fed. Cont. Rep. (BNA) A-1 (May 25, 1964).

299. 41 C.F.R. sec. 1-1.604-1(b) (1965).
300. Id.
301. Id.
302. Id. at subparts 4-1.6; 9-1.6; 11-1.6; 18-1.6.
303. 7 C.F.R. part 1407 (1965).
304. Id. sec. 1407.6(c).
305. 41 C.F.R. sec. 4-1.604-1(c) (1965).
306. 41 C.F.R. sec. 9-1.606-56.
307. 32 C.F.R. subpart F (1966). For background and commentary on this evolution of the ASPR and procurement regulations in general see Nagle, supra note 13, at 128-140.
308. 41 C.F.R. sec. 5-1.603(b) (1967).
309. 34 Fed. Reg. 19,972 (1969).
310. 463 F.2d 1268 (D.C. Cir. 1972), rev'g, 342 F. Supp. 703 (D.D.C. 1972).
311. Id. at 705 (quoting the suspension notice letter).

312. Id. at 706.

313. 32 C.F.R. secs. 1.605 to 1.606 (1971).

314. Horne Brothers, 342 F. Supp. at 707-08. Between the district court decision and the circuit court decision the Comptroller General denied Horne Brother's protest based on the same grounds as the suit. 51 Comp. Gen. 703 (1972).

315. Horne Brothers, 463 F.2d at 1269.

316. Id. at 1270.

317. Id. at 1271.

318. Id.

319. Id.

320. Id.

321. Id. at 1271 n.8. Horne was indicted by the time of this decision and based, in part, on this footnote by the court another protest by Horne Brothers was denied by the Comptroller General. 51 Comp. Gen. 810 (1972).

322. Horne Brothers, 463 F.2d at 1272.

323. Id. at 1271.

324. Comm. on Government Procurement, Report of the Commission on Government Procurement, (1972).

325. 4 id. at 67.

326. See 1 id. at 123.

327. See 4 id. at 65-68.

328. Id. at 65.

329. Id.

330. Id. at 66-67.

331. Id. at 68.

332. Id.

333. Id. For background on the development of OFPP, see Nagle, supra note 13, at 144-49.

334. Debarment: Proposed ASPR Change Reflects Court Displeasure with Aspects of DOD Procedure, 465 Fed. Cont. Rep. (BNA) A-16 (Jan. 29, 1973).

335. Id. at A-17, sec. 1-605.3(i).

336. Id. at A-16, sec. 1-605.2(a)(2).

337. Id.

338. 32 C.F.R. secs. 1-605.2, 1-605.3(v) (1975).

339. Debarment: ABA and CODSIA Comment on Proposed ASPR Change Resulting from Court of Appeals Decision, 475 Fed. Cont. Rep. (BNA) A-1 (Apr. 9, 1973).

340. Id. at A-1 to A-2.

341. 39 Fed. Reg. 13,777 (1974) (codified at 41 C.F.R. secs. 1-1.605-3 to 1-1.605-5 (1974)).

342. 41 C.F.R. sec. 1-1.605-3(f) (1974).

343. 40 Fed. Reg. 22,318 (1975).

344. Id. at 22,319. For a more detailed analysis of these recommendations see Steadman, supra note 3, 809-14.

345. Debarment: Proposed Interagency Task Group Proposal on Debarment Brings Mixed Bag of Comments, 594 Fed. Cont. Rep. (BNA) A-17 (Aug. 18, 1975).

346. 419 F. Supp. 130 (D.D.C. 1976).

347. Id. at 131.

348. Id.

349. Id. at 132.



350. Id.

351. Id.

352. Lahendro, The Debarment and Suspension of Government Contractors: Who's on First? 39 (1975) (unpublished thesis on file in the special collections area, Gelman Library, George Washington University).

353. Id. at 104.

354. Steadman, supra note 3, at 814-17.

355. Id. at 817.

356. Id. at 817-18.

357. 527 F.2d 1252 (2d Cir. 1975).

358. See id. at 1258. In fact the Post Office's General Counsel stated in its investigation of the matter that the Post Office's actions constituted a de facto debarment. Id. at 1255.

359. Id. at 1262.

360. 473 F. Supp. 1 (D.D.C. 1978).

361. Id. at 3.

362. Id. at 5.

363. See id. at 5-8 (while the court never used the term de facto debarment, it found GSA had "suspended," "blacklisted," and "debarred" the firm in contravention of GSA regulations and the law).

364. Id. at 8.

365. 631 F.2d 953 (D.C. Cir. 1980), rev'g 471 F. Supp. 300 (D.D.C. 1979).

366. The decision held that the contractor had a constitutionally protected liberty interest arising out of the stigma attaching to a nonresponsibility decision based on a lack of integrity. Consequently, the contractor was entitled to due process sufficient to protect that right. This decision, therefore, effectively ended any speculation by the agencies that de facto debarments might provide a means by which to shortcut suspension or debarment procedures. Further, since suspension and debarment are formalized procedures by which these type of nonresponsibility decisions are made, constitutionally protected due process rights also attach to suspension and debarment procedures. A new twist was given to the "fundamental fairness" required by Horne Brothers and the "considerations of basic fairness" required by Gonzalez.

367. Old Dominion, 631 F.2d at 957-58.

368. Old Dominion, 471 F. Supp. 300, 303 and 631 F.2d 953, 961 n.17.

369. Old Dominion, 471 F. Supp. 300, 303.

370. Old Dominion, 631 F.2d at 961 n.17.

371. Id.

372. See id. at 955-56 ("when the Government effectively bars a contractor from virtually all Government work due to charges the contractor lacks honesty or integrity . . . ."), 960 ("this was not a case where denial of one contract at least gave the contractor 'constructive' notice . . . [Old Dominion] was denied a second contract . . . ."), 961 n.17.

373. Old Dominion, 471 F. Supp. 300, 301-02.

374. Id.

375. Id. at 301.

376. Id. at 303.

377. Id.

378. Old Dominion, 631 F.2d at 960.

379. Id. at 961-66.

380. Id. at 968.

381. Id. at 955-56.

382. A review of subsequent cases regarding suspension and debarment show Old Dominion cited for this proposition in almost every case where the matter was an issue. For a critical analysis of the Old Dominion opinion see, Note, Government Contracts - Nonresponsibility Determinations - The Federal Government Violates a Contractor's Due Process Liberty Interest by Failing to Provide Prior Notice and an Opportunity to Rebut Charges Contained in Nonresponsibility Determinations Based on Lack of Integrity - Old Dominion Dairy Products, Inc. v. Secretary of Defense, 631 F.2d 953 (D.C. Cir. 1980), 50 Geo. Wash. L. Rev. 90 (1981).

383. 639 F.2d 318 (6th Cir. 1981), cert. denied, 454 U.S. 820 (1981).

384. Id. at 320.

385. Id. at 321.

386. Id. at 322.

387. See id. at 322-23.

388. Id. at 323.

389. Id. at 324. For a more detailed analysis of this case and commentary critical of the circuit court's approval of the government's right to withhold a hearing see Everhart, "Graylisting" of Federal Contractors: Transco Security, Inc. of Ohio v. Freeman

and Procedural Due Process Under Suspension and Debarment Procedures, 31 Cath. U.L. Rev. 731 (1982).

390. 32 C.F.R. (1979).

391. Spreadsheet converting DAR and FPR coverage to proposed FAR (Review Panel date of Oct. 4, 1978) and Memorandum from Colonel John Slinkard to Director, FPR Directorate (Dec. 18, 1978) (both available in GSA files on FAR conversion, FAR subpart 9.4). According to the testimony of Mr. Mathis, acting administrator OFPP, the review began in 1977. Government-Wide Debarment and Suspension Procedures, 1981: Hearings Before the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs, 97th Cong., 1st Sess., 420 (1981).

392. Spreadsheet converting DAR and FPR coverage to proposed FAR (submittal to OFPP dated Mar. 27, 1979) and memorandum from Colonel John D. Slinkard to GSA FAR Project Manager (Apr. 16, 1979) (both available in GSA files on FAR conversion, FAR subpart 9.4).

393. Memorandum from Colonel John J. Slinkard to GSA FAR Project Manager (Apr. 16, 1979) (available in GSA files on FAR conversion, FAR subpart 9.4).

394. Spreadsheet converting DAR and FPR coverage to proposed FAR (submittal to OFPP dated Feb. 24, 1981) and letter from Lawrence J. Rizzi to William J. Maraist (Feb. 24, 1981) (both available in GSA files on FAR

conversion, FAR subpart 9.4).

395. Preliminary Draft of Proposed FAR Provisions on Debarment and Suspension, 873 Fed. Cont. Rep. (BNA) E-1 to E-6 (Mar. 16, 1981).

396. Id. at secs. 9.402(j); 9.406-4(b), (e)(2), (e)(3); 9.407-1(b); 9.407-4(b), (d), (e)(2), (e)(3).

397. Id. at secs. 9.406-4(b), 9.406-4(c).

398. Id. at secs. 9.406-4(d), 9.406-4(e)(2).

399. Id. at sec. 9.406-4(e)(3).

400. Id. at sec. 9.406-4(e)(5). Also, see secs. 9.402(h), 9.406-4(f), 9.407-4(f)(3), 9.407-4(f)(4).

401. Id. at sec. 9.406-4(e)(6).

402. Id. at sec. 9.402(h).

403. Id. at sec. 9.406-4(f)(2). There was a provision allowing that if the debarment was based on a conviction for an enumerated offense, the hearing official could limit the presentation to "documentary evidence and written briefs . . . ." Id. at sec. 9.406-4(e)(5).

404. Id. at sec. 9.406-4(f)(4).

405. Id. at secs. 9.407-1, 9.407-4.

406. Id. at secs. 9.402(1), 9.407-4(d).

407. Government-Wide Debarment and Suspension Procedures, 1981: Hearings Before the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs, 97th Cong., 1st Sess. (1981) [hereinafter Hearings].

408. Id. at 2.

409. Id. at 3.

410. 5 U.S.C. app. (1982 & Supp. III 1985). The original act required an Office of Inspector General in the following departments: Agriculture, Commerce, Housing and Urban Development, Interior, Labor, and Transportation. The act also required Inspectors General in the following agencies: Community Services Administration, Environmental Protection Agency, General Services Administration, National Aeronautics and Space Administration, Small Business Administration, and Veteran's Administration. Amendments added the office to the Department of Education in 1979; the Agency for International Development in 1981; the Department of Defense in 1982; and the Department of State in 1985.

411. Id. at sec. 2.

412. Hearings, supra note 407, at 35 (statement of Harry Velzer, GSA Office of the Inspector General (OIG)); 36, 39 (statement of Howard Cox, GSA OIG); 510 (statement of Paul Adams, HUD OIG).

413. See id. at 6-41.

414. Id. at 461-64.

415. HUD had from 300-600 suspension and debarment actions each year, but many of these actions involved grantee relationships. Id. at 313-14 (testimony of S. Leigh Curry, Jr., Deputy General Counsel, HUD). The Veteran's Administration reported only suspension actions and showed a high of 919 in 1975, to a low of 229 actions in 1977.

416. See id. at 462-63. While figures were provided for 1981, they are not included here as they were incomplete.

417. Id.

418. Staff of the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs, 97th Cong., 1st Sess., Reform of Government-Wide Debarment and Suspension Procedures 11 (Comm. Print 1981).

419. Id. at 18-20.



420. Hearings, supra note 407, at 422.
421. 46 Fed. Reg. 37,832 (1981).
422. Id. at paras. 6.3c, 6.3d, 7.3c, 7.3d.
423. Id. at paras. 6.3b(2), 7.3b(1)(ii).
424. Id. at para. 6.3b(7). Proposed FAR coverage sec. 9.406-3(a)(4) required that when a notice of proposed debarment was sent by an agency, it had to advise that if "no suspension is in effect under . . . [the suspension procedures] that it may not award contracts to the concern for a period not exceeding 30 days, pending the debarment decision." Spreadsheet converting DAR and FPR coverage to proposed FAR (submittal to OFPP dated Feb. 24, 1981) (available in GSA files on FAR conversion, FAR subpart 9.4) (emphasis added).
425. Spreadsheet converting DAR and FPR coverage to proposed FAR, secs. 9.407-3(b)(1) and (3) (submittal to OFPP dated Feb. 24, 1981) (available in GSA files on FAR conversion, FAR subpart 9.4).
426. 46 Fed. Reg. 37,832 (1981) at paras. 7.3c, 7.3d.
427. Id. at para. 3.f.
428. Id. at para. 6.2a.
429. Id. at para. 6.1b.

430. Id. at paras. 6.5d, 7.5.

431. Id. at para. 7.2b.

432. The 1974 changes to the ASPR and FPR both provided that if the suspension was based on an indictment, a contractor would be notified of that fact and that no hearing right would be provided. 41 C.F.R. secs. 1-1.605-3(a)(1), 1-1.605-3(f), 1-1.605-4 (1974) and 32 C.F.R. 1-605.2(b)(1), 1-605.3(v) (1975). See also infra pp. 52-53 and Horne Brothers, 463 F.2d 1271 n.8. Further evidence that this was the practice can be inferred from a review of the comments provided by the contractors and their representatives. A review indicates little comment on the provision indicating anything other than acceptance. Most law firm submissions, including the ABA comment, were silent on the provision. The exception to that trend is included in the enclosure to the letter of Stanton D. Anderson to Donald E. Sowle, pp. 27-28 (Sep. 10, 1981)(available in GSA files on FAR conversion, FAR subpart 9.4)(the comments are those that would be expected, i.e. "an indictment is not evidence of anything . . . ." Id. at 28).

433. 47 Fed. Reg. 28,854 (1982). The 600 comments were contained in 79 letters. 48 letters were from government agencies with ten of those letters coming from OIG's of various agencies. 29 letters were from various companies, trade associations, law firms representing such entities, or schools. Two letters

were from individuals. Based on an examination of the letters and an index prepared during the comment review. (Available in GSA files on FAR conversion, FAR subpart 9.4).

434. Debarment: GSA, Agencies Urge OFPP to Incorporate FAR Language, Grantee Contracts, into Policy Letter, 906 Fed. Cont. Rep. (BNA) A-16, A-17 (Nov. 11, 1981).

435. Id. at A-20 to A-22.

436. Id. at A-17 to A-18.

437. Debarment: OFPP's Proposed Debarment Policy Doesn't Provide Sufficient Due Process, BCA Members Told, 928 Fed. Cont. Rep. (BNA) A-9 (Apr. 19, 1982).

438. 534 F. Supp. 1139 (D.D.C. 1982), rev'd 714 F.2d 163 (D.D.C. 1983). Whether the quasi-judicial nature of the debarment process was a holding of the case is open to interpretation. The court's statement was used to support one of its holdings, but the court made no inquiry into the actual nature of the debarment decisionmaking process. Id. at 1157. The holding supported by the statement was reversed, although the circuit court did not question the quasi-judicial nature of the proceeding. Kiewit, 714 F.2d at 170.

439. Debarment, supra note 436, at A-10.

440. Debarment: OFPP Issues Policy Letter on Debarment, Suspension; Few Major Changes made from 1981 Proposal, 938 Fed. Cont. Rep. (BNA) AA-1 (June 28, 1982).

441. 47 Fed. Reg. 28,854 (1982).

442. Id. This changed a standard initiated by the Air Force in 1950 and adopted by the ASPR in 1953. Infra pp. 19, 24.

443. 47 Fed. Reg. 28,854, paras. 4, 7.2(a) (1982). Reinstating a provision first found in the ASPR in 1953. Infra pp. 22-23.

444. 47 Fed. Reg. 28,854 paras. 4, 7.3(d)(3) (1982).

445. Id. at paras. 7.1(b)(2), 8.1(c)(2).

446. See id. at paras. 7.5, 8.5.

447. Id. at 28,854.

448. 47 Fed. Reg. 43,692 (1982).

449. 48 Fed. Reg. 9,150 (1983). The amendment was effective December 27, 1982, based on Defense Acquisition Circular #76-41. Reprinted in id.

450. See infra app. A.

451. See, Deline, Taking the Offensive with the Procurement Fraud Division, The Army Lawyer, June 1987, at 13.

452. Debarment: DOD Debarring Officials Need Better Ties with Investigators, IG Recommends, 42 Fed. Cont. Rep. (BNA) 726, 727 (Oct. 29, 1984) (note that the figures for 1981 - 1983 were for calendar years).

453. General Accounting Office, GAO/NSIAD-87-37-BR, Procurement - Suspension and Debarment Procedures, 28 (Feb. 1987) [hereinafter GAO].

454. Debarment: Defense IG Reports Rise in Suspensions, Debarments, 46 Fed. Cont. Rep. (BNA) 1007 (Dec. 15, 1986).

455. Audits: Audit Savings Drop; Suspensions and Debarments Level Off, Defense IG Reports, 48 Fed. Cont. Rep. (BNA) 72, 73 (July 20, 1987).

456. Report captioned "Automated Fraud Tracking System (AFTS) Case Inventory" (Dec. 31, 1987) (provided by the Procurement Fraud Division, Office of the Judge Advocate General, U.S. Army).

457. GAO, supra note 453, at 30.

458. See id. The report indicate that 27% of the Army's fiscal year 1985 actions were fact-based. Based on 165 actions taken in fiscal year 1985, approximately

45 fact-based actions were taken. See id. at 28.

459. Based on the number of open files designated as "main cases" within the Procurement Fraud Division's Automated Fraud Tracking System, as of Feb. 24, 1988.

460. Based on the author's three year experience with the Procurement Fraud Division (previously Contract Fraud Branch, Litigation Division), less than 2% of the Army actions became the subject of suits seeking to enjoin the suspension or debarment.

461. Old Dominion, 631 F.2d at 966, but see Note, supra note 382 (for an analysis disagreeing with the court's finding of a corporate liberty interest).

462. 400 U.S. 433 (1971).

463. 408 U.S. 564 (1972).

464. Id. at 573; Constantineau, 400 U.S. at 437. See Note, supra note 382, at 108-09 for an analysis that disagrees that a nonresponsibility decision is the type of injury to reputation sufficient to implicate a liberty interest. The analysis would support the conclusion that a suspension or debarment is the type of injury sufficient to implicate a liberty interest.

465. 424 U.S. 693 (1976).

466. Id. at 701, 711-12. See also Note, supra note 382, at 100-03.

467. Old Dominion, 631 F.2d at 956, citing Paul v. Davis, 424 U.S. at 706, and Cafeteria Workers, 367 U.S. at 898.

468. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

469. 424 U.S. 319 (1976).

470. Id. at 335.

471. De facto debarment cases are, by definition, conducted without observing the protections of the regulatory scheme. Consequently, pure de facto cases are outside the scope of this part of the thesis and will not be addressed.

472. Transco, 639 F.2d at 321 and 324.

473. Id. at 322.

474. Id.

475. Id.

476. Id. at 322-24.

477. Kiewit was technically the next debarment case to be heard; however, the case was a de facto debarment which was converted to a formal proposed debarment by the time it reached the court. While the district court recognized Old Dominion in stating the contractor's interest, it did not apply the Mathews balancing test because the de facto debarment provided no due process and it was the court's opinion that the subsequent debarment proceeding could not rectify that failure. Kiewit 534 F. Supp. at 1153, 1154. The district court opinion is very broad and might have become a serious restraint in the suspension and debarment field had it not been reversed based on the circuit court's finding that there had been no exhaustion of administrative remedies. See Kiewit, 714 F.2d at 168, 171.

478. 728 F.2d 1471 (Fed. Cir. 1984), aff'g in part, rev'g in part 3 Cl. Ct. 500 (1983).

479. As a general proposition the Claims Court does not have jurisdiction over debarment and suspension decisions, but there may be jurisdiction depending on when the debarment or suspension occurs in the procurement process. A good summary of this jurisdiction occurs in Sterlingwear of Boston, Inc. v. United States, 11 Cl. Ct. 517, 520-24 (1987). Other cases discussing Claims Court jurisdiction in matters of suspension and debarment include Related Indus., Inc. v. United States, 2 Cl. Ct. 517, 524-27 (1983); Cecile Indus., Inc. v. United States, 2 Cl. Ct. 690, 692-93



(1983); Electro-Methods, Inc. v. United States, 728 F.2d 1471, 1475 (Fed. Cir. 1984), aff'g in part, rev'g in part 3 Cl. Ct. 500, 505-507 (1983); ATL, Inc. v. United States, 736 F.2d 677, 681-83 (Fed. Cir. 1984), rev'g in part, aff'g in part 4 Cl. Ct. 374, 378-80 (1984); ATL, Inc. v. United States, 4 Cl. Ct. 672, 674-76 (1984), aff'd 735 F.2d 1343, 1344-45 (Fed. Cir. 1984); Sterlingwear of Boston, Inc. v. United States, 10 Cl. Ct. 644, 647-48 (1986). For a more detailed exposition on Claims Court jurisdiction see Hopkins, The Universe of Remedies for Unsuccessful Offerors on Federal Contracts, 15 Pub. Cont. L.J. 365, 422-44 (1985).

480. Electro, 3 Cl. Ct. at 509 (emphasis added) (the court cited no authority for the proposition that a property interest was involved except general citations to Gonzalez and Horne Brothers).

481. 408 U.S. 471 (1972).

482. Electro, 3 Cl. Ct. at 509-10.

483. Id. at 510.

484. Id. at 503-04.

485. Electro, 728 F.2d at 1475-76.

486. Id. at 1476 (footnote omitted).

487. 736 F.2d 677 (Fed. Cir. 1984), rev'g in part,  
aff'g in-part 4 Cl. Ct. 374 (1984).

488. ATL, Inc. v. United States, 3 Cl. Ct. 52, 53  
(1983).

489. Id. at 53-55.

490. Id. at 52, 55.

491. ATL, Inc. v. United States, 3 Cl. Ct. 49, 50  
(1983).

492. Id. at 52.

493. ATL, Inc. v. United States, 3 Cl. Ct. 259, 267-  
271 (1983).

494. Id. at 274.

495. Id. (emphasis added).

496. Id.

497. Id.

498. Id.

499. Id. at 275.

500. Id.

501. Id.

502. Id.

503. Id. at 276. The court's caution may have been imposed by the appeals court decision in Kiewit, holding that failure to have the contractor exhaust his administrative remedies was a basis for reversal.

504. ATL, Inc. v. United States, 4 Cl. Ct. 374 (1984), rev'd in part, aff'd in part 736 F.2d 677 (Fed. Cir. 1984), reh'g 6 Cl. Ct. 539 (1984).

505. Id. at 376.

506. Id. at 376-77.

507. Id.

508. ATL, 736 F.2d at 684 & n.33.

509. Id. at 378.

510. Id. at 376, 378.

511. Id. at 380-85.

512. Id. at 385.

513. Id.

514. Id. at 385-89.

515. Id. at 386-87.

516. Id. at 387-88.

517. Id. at 390.

518. ATL, 736 F.2d at 677. While this action was winding through the courts, ATL had been the low bidder on two United States Army Corps of Engineers projects in December 1983 and January 1984. Based on the Navy suspension, the Army refused to award the contracts to ATL and ATL sued in the Claims Court requesting an injunction against the Army. ATL, Inc. v. United States, 4 Cl. Ct. 672, 673-74 (1984), aff'd 735 F.2d 1343 (Fed. Cir. 1984). The Claims Court determined that it had no jurisdiction over the case as there was no "implied contract for the fair consideration" of ATL's bids because ATL was the subject of a suspension that "had not been revoked nor set aside" when the bids were opened. Id. at 675. For a more extensive review of the jurisdiction of the Claims Court over suspension and debarment actions see infra note 479.

519. ATL, 736 F.2d at 682.

520. Id. at 682.

521. Id. at 683 (footnotes omitted).

522. Id. at 684 n.31.

523. Id.

524. Id. at 686.

525. Id.

526. Id. at 684.

527. Id. at 686.

528. Id. at 687.

529. Id.

530. Id. at 684, 685, 686, 687 (separate criticisms of the Navy's secretive attitude appear on each page).

531. Id. at 685.

532. Id. at 684-86. The Claims Court revisited ATL one more time in 1984. The Navy provided ATL another opposition on July 11, 1984. A 79 count indictment was returned against ATL on September 5, 1984, none of the charges included the facts upon which the suspension was based. ATL filed for summary judgment on October 12, 1984, claiming that its suspension was now void as the charges were no longer under investigation or were the basis of legal proceedings. The Navy terminated the original suspension on November 2, 1984, and in the

same letter issued a new suspension based on the 79 count indictment. ATL then requested the injunctions be continued pending the hearing on its motion for summary judgment. The Claims Court denied ATL's request. ATL, 6 Cl. Ct. 539 (1984).

533. Sarah Taylor v. John O. Marsh, No. 81-2643, slip op. at 7 n.2 (D.D.C. December 3, 1982); Ontario Air Parts, Inc. v. United States, No. 85-0533, slip op. at 4 (D.D.C. Mar. 8, 1985) reprinted in 43 Fed. Cont. Rep. (BNA) 566 (Apr. 1, 1985); Titan Constr. Co., Inc. v. Weinberger, No. 85-5533, slip op. at 8-12 (D.N.J. Jan. 6, 1986), a'ffd, No. 86-5088 (3d Cir. Sep. 19, 1986).

534. See Shermco Indus., Inc. v. Secretary of the Air Force, 584 F. Supp. 76, 87-88 (N.D. Tex. 1984) (the court uses the abbreviated steps of Transco without citing to Mathews); Mikulec v. Dep't of the Air Force, No. 84-2248, slip op. at 6 n.3 (D.D.C. Aug. 6, 1984) (the court cited to Old Dominion, which explicitly used the Mathews criteria, to support its conclusion that adequate due process had been provided).

535. But see Joseph Constr. Co. v. Veterans Admin., 595 F.Supp 448 (D.C. Ill. 1984) (the court upheld the constitutionality of the suspension and debarment provisions of the FAR in a relatively summary fashion without appearing to apply the Mathews factors). Another case in which it was alleged the debarment was "unlawful" was Shane Meat Co., Inc. v. United States Department of Defense, No. 85-0684, slip op. at 1 (E.D.

Pa. Sep. 5, 1985) rev'd 800 F.2d 334 (3d Cir. 1986). Although the contractor alleged the debarment was unlawful the relief requested was for a reduction of the debarment period from three years to one year. Consequently, although the court stated the debarment was authorized, it did not analyze the constitutionality of the process.

536. See infra pp. 26-33, 59-61. The endorsement comes not so much from the fact that houses of Congress have commented favorably on suspension and debarment procedures, but in that knowing of their existence no attempt to curtail or modify them has been successful. For one negative report see H.R. 4798, 98th Cong., 2d Sess. 12 (1984).

537. See infra pp. 42-43. The Gonzalez court, speaking of the legislation creating the CCC, found the authority for debarment "inherent and necessarily incident to the effective administration of the statutory scheme." Gonzalez, 334 F.2d at 577. It can hardly be argued that such a power is any less inherent or incident to the contracting power of the United States government. See also Calamari, Aftermath of Gonzalez and Horne on the Administrative Debarment and Suspension of Government Contractors, 17 New Eng. L. Rev. 1137, 1172-73 (1981/1982).

538. See infra pp. 67-77.

539. Id.

540. Mathews, 424 U.S. at 335.

541. See Cox, Due Process Issues in Suspension and Debarment: A Government Perspective, 43 Fed. Cont. Rep. (BNA) 429 (Mar. 11, 1985).

542. See Transco, 639 F.2d at 322 ("Not only does the government have its usual concern that it get its money's worth, a concern present in all expenditures of taxpayers' money . . . ."); Merritt and Sons v. Marsh, 791 F.2d 328, 331 (4th Cir. 1986) ("The proper expenditure of tax dollars is, of course, a primary responsibility of the government. It is not only correct for the government to question the integrity of a contractor who has been indicted for the manner in which he carried out military contracts, but failure to do so would be highly irresponsible.")

543. Examples might include investigation, arrest, prosecution, taxes, and licensing.

544. Examples might include welfare benefits, school, fire services, emergency medical services, police protection, unemployment benefits, and farm assistance programs. While there exist alternatives to government providing these types of programs, the situation envisioned is where such alternatives are not really feasible and the only real alternative is to forgo the benefit of the program altogether.

545. 310 U.S. 113 (1940).



546. Id. at 127.

547. Reeves, Inc. v. Stake, 447 U.S. 429, 439 n.12 (1980).

548. The courts in Transco and Shermco both found a government interest in receiving the services which had been purchased. Transco, 639 F.2d at 322; Shermco, 584 F. Supp. at 88. The Transco court also found a government interest in getting value for its money. Transco, 639 F.2d at 322. These governmental interests would coincide with the interests of a consumer. In Ontario Air the court found a government interest in not getting defective parts and "a strong interest in not doing business with unscrupulous suppliers . . . ." Ontario Air, No. 85-0533, slip op. at 5. In Titan, the court stated "the government has a strong interest in insuring that only responsible contractors perform government services." Titan, No. 85-5533, slip op. at 9. The use of this broad language by both Titan and Ontario Air indicate a recognition of the government's interests as a purchaser.

549. In Old Dominion the government interest was the need to "conduct Government business effectively and efficiently." Old Dominion, 631 F.2d at 968. In Transco the government interests were that the government "get its money's worth," that the services concerned in the contract were essential to important government operations, and that the criminal investigation be protected. Transco, 639 F.2d at 322. In

Shermco the government interests were that the government obtain essential repair services and that the criminal prosecution be protected. Shermco, 584 F. Supp. at 88. In ATL two Claims Court opinions stated the only government interest was that the criminal prosecution be protected; the circuit court opinion noted only that the government interest was in protecting an ongoing criminal investigation. ATL, 3 Cl. Ct. at 275; 4 Cl. Ct. at 389; 736 F.2d at 684, 686. In Ontario Air the court noted the need for protecting the government from defective parts and "a strong interest in not doing business with unscrupulous suppliers." Ontario, No. 85-0533, slip op. at 5. The court in Titan, stated "the government has a strong interest in insuring that only responsible contractors perform government services." Titan, No. 85-5533, slip op. at 9. Finally, although not applying the Mathews factors, the court in Merritt, has remarked on this subject saying, "[t]he proper expenditure of tax dollars is, of course, a primary responsibility of the government." Merritt, 791 F.2d at 331.

550. With the obvious exceptions of antitrust and discrimination laws.

551. See letter from Paul G. Dembling to Donald E. Sowle (Sep. 25, 1981) attachment titled American Bar Association Section of Public Contract Law, Subject: Proposed OFPP Policy Letter 81-3, Policy Guidance Concerning Government-Wide Debarment, Ineligibility, and Suspension, Summary of Comments, 2 para. 2 (avail-

able in GSA files on FAR conversion, FAR subpart 9.4) (suggests "independent judge . . . hearing upon its [contractor's] request" no matter what the circumstances, "testimony must be given under oath," contractor has "full right of cross-examination . . . subpoenas of documents and witnesses at the contractor's request, . . . application of the Federal Rules of Evidence, . . . prohibition against ex parte communications, and . . . the holding of the hearing at a site convenient to the contractor"). See also Graham, Suspension of Contractors and Ongoing Criminal Investigations for Contract Fraud: Looking for Fairness from a Tightrope of Competing Interests, 14 Pub. Cont. L.J. 216, 236-38 (1984) (a discussion of recommendations proposed by the ABA to reform the suspension and debarment area, which Graham analyzes as having substantial deficiencies).

552. Calamari, supra note 537, at 1173; Everhart, supra note 389, at 765; Horowitz, Looking for Mr. Good Bar: In Search of Standards for Federal Debarment, 14 Pub. Cont. L.J. 58 (1983).

553. See Calamari, supra note 537, at 1173 (appearance of impartiality); Everhart, supra note 389, at 765 (unable to "equitably serve as prosecutor, grand jury, and judge"); Horowitz, supra note 552, at 91-92 ("propriety . . . may particularly be suspect where his determination is based on the recommendation of agency attorneys or other employees who have prosecutorial role.")

554. ATL, 736 F.2d at 686-87; see Transco, 639 F.2d at 322 (states that the requirement that a "top level administrator" make the decision is sufficient for due process purposes).

555. See infra at pp. 2-5; Nagle, supra note 13, at 12-19.

556. See Office of Management and Budget, Circular No. A-76(Revised) (Aug. 4, 1983).

557. GAO recently concluded that suspension and debarment "provides an effective tool for protecting the government against the risks associated with doing business with fraudulent, unethical, or nonperforming procurement contractors." GAO, supra note 453, at 9. Another measurement of the effectiveness of suspension and debarment is the deterrent effect of the process. In 1975, it was noted that "a currently debarred contractor, with twenty odd years Government contracting experience, has never known of other debarred contractors and opined that debarment has little or no deterrent effect, other than possibly deterring a once debarred contractor from committing future violations." Lahendro, supra note 352, at 49-50. Today it would be a rare government contractor who has not heard of debarment or suspension. The suspensions of large firms have made headlines across the country. Courses and publications offered to government contractors and the public contracts bar emphasize the use of suspension and debarment and the government's serious

attitude toward improper and illegal behavior. See, Ethics in Government Contracting Course and Government Contract Fraud Course, offered by Federal Publications, Incorporated; B. Elmer, J. Swennen & R. Beizer, Government Contract Fraud, ch. 7 (1985); DeVecchio & Johnson, Debarment & Suspension / Edition II, 83-9, The Government Contractor Briefing Papers (Sep. 1983).

inform the contracting office whether to approve, conditionally approve, or disapprove the first article. The contracting officer shall then notify the contractor of the action taken and furnish a copy of the notice to the contract administration office. The notice shall include the first article shipment number, when available, and the applicable contract line item number. Any changes in the drawings, designs, or specifications determined by the contracting officer to be necessary shall be made under the Changes clause, and not by the notice of approval, conditional approval, or disapproval furnished the contractor.

### **9.308 Contract clauses.**

#### **9.308-1 Testing performed by the contractor.**

(a) (1) The contracting officer shall insert the clause at 52.209-3, First Article Approval—Contractor Testing, in solicitations and contracts when a fixed-price contract is contemplated and it is intended that the contract require (i) first article approval and (ii) that the contractor be required to conduct the first article testing.

(2) If it is intended that the contractor be required to produce the first article and the production quantity at the same facility, the contracting officer shall use the clause with its Alternate I.

(3) If it is necessary to authorize the contractor to purchase material or to commence production before first article approval, the contracting officer shall use the clause with its Alternate II.

(b) (1) The contracting officer shall insert a clause substantially the same as the clause at 52.209-3, First Article Approval—Contractor Testing, in solicitations and contracts when a cost-reimbursement contract is contemplated and it is intended that the contract require (i) first article approval and (ii) that the contractor be required to conduct the first article test.

(2) If it is intended that the contractor be required to produce the first article and the production quantity at the same facility, the contracting officer shall use a clause substantially the same as the clause at 52.209-3, First Article Approval—Contractor Testing, with its Alternate I.

(3) If it is necessary to authorize the contractor to purchase material or to commence production before first article approval, the contracting officer shall use a clause substantially the same as the clause at 52.209-3, First Article Approval—Contractor Testing, with its Alternate II.

#### **9.308-2 Testing performed by the Government.**

(a) (1) The contracting officer shall insert the clause at 52.209-4, First Article Approval—Government Testing, in solicitations and contracts when a fixed-price contract is contemplated and it is intended that the contract require first article approval and that the Government will be responsible for conducting the first article test.

(2) If it is intended that the contractor be required to produce the first article and the production quantity at the same facility, the contracting officer shall use the basic clause with its Alternate I.

(3) If it is necessary to authorize the contractor to purchase material or to commence production before first article approval, the contracting officer shall use the basic clause with its Alternate II.

(b) (1) The contracting officer shall insert a clause substantially the same as the clause at 52.209-4, First Article Approval—Government Testing, in solicitations and contracts when a cost-reimbursement contract is contemplated and it is intended that the contract require first article approval and that the Government be responsible for conducting the first article test.

(2) If it is intended that the contractor be required to produce the first article and the production quantity at the same facility, the contracting officer shall use a clause substantially the same as the clause at 52.209-4, First Article Approval—Government Testing, with its Alternate I.

(3) If it is necessary to authorize the contractor to purchase material or to commence production before first article approval, the contracting officer shall use a clause substantially the same as the clause at 52.209-4, First Article Approval—Government Testing, with its Alternate II.

## **SUBPART 9.4—DEBARMENT, SUSPENSION, AND INELIGIBILITY**

### **9.400 Scope of subpart.**

(a) This subpart—

(1) Prescribes policies and procedures governing the debarment and suspension of contractors by agencies for the causes given in 9.406-2 and 9.407-2;

(2) Provides for the listing of these debarred and suspended contractors, and of contractors declared ineligible (see the definition of "ineligible" in 9.403); and

(3) Sets forth the consequences of this listing.

(b) Although this subpart does cover the listing of ineligible contractors (9.404) and the effect of this listing (9.405(b)), it does not prescribe policies and procedures governing declarations of ineligibility.

### **9.401 Applicability.**

This subpart does not apply to recipients of Federal assistance.

### **9.402 Policy.**

(a) Agencies shall solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only. Debarment and suspension are discretionary actions that, taken in accordance with this subpart, are appropriate means to effectuate this policy.

(b) The serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the Government's protection and not

for purposes of punishment. Agencies shall impose debarment or suspension to protect the Government's interest and only for the causes and in accordance with the procedures set forth in this subpart.

(c) Agencies shall establish appropriate procedures to implement the policies and procedures of this subpart.

#### 9.403 Definitions.

"Adequate evidence" means information sufficient to support the reasonable belief that a particular act or omission has occurred.

"Affiliates." Business concerns or individuals are affiliates if, directly or indirectly, (a) either one controls or can control the other or (b) a third controls or can control both.

"Agency," as used in this subpart, means any executive department, military department or defense agency, or other agency or independent establishment of the executive branch.

"Consolidated List of Debarred, Suspended, and Ineligible Contractors" means a list compiled, maintained, and distributed by the General Services Administration, in accordance with 9.404, containing the names of contractors debarred or suspended by agencies under the procedures of this subpart, as well as contractors declared ineligible under other statutory or regulatory authority.

"Contractor," as used in this subpart, means any individual or other legal entity that (a) submits offers for or is awarded, or reasonably may be expected to submit offers for or be awarded, a Government contract or a subcontract under a Government contract or (b) conducts business with the Government as an agent or representative of another contractor.

"Conviction" means a judgment or conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, and includes a conviction entered upon a plea of nolo contendere.

"Debarment," as used in this subpart, means action taken by a debarring official under 9.406 to exclude a contractor from Government contracting and Government-approved subcontracting for a reasonable, specified period; a contractor so excluded is "debarred."

"Debarring official" means (a) an agency head or (b) a designee authorized by the agency head to impose debarment.

"Indictment" means indictment for a criminal offense. An information or other filing by competent authority charging a criminal offense shall be given the same effect as an indictment.

"Ineligible," as used in this subpart, means excluded from Government contracting (and subcontracting, if appropriate) pursuant to statutory, Executive order, or regulatory authority other than this regulation and its implementing and supplementing regulations; for example, pursuant to the Davis-Bacon Act and its related statutes and implementing regulations, the Service Contract Act, the Equal Employment Opportunity Acts and Executive orders, the Walsh-Healey Public Con-

tracts Act, the Buy American Act, or the Environmental Protection Acts and Executive orders.

"Legal proceedings" means any civil judicial proceeding to which the Government is a party or any criminal proceeding. The term includes appeals from such proceedings.

"Preponderance of the evidence" means proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

"Suspending official" means (a) an agency head or (b) a designee authorized by the agency head to impose suspension.

"Suspension," as used in this subpart, means action taken by a suspending official under 9.407 to disqualify a contractor temporarily from Government contracting and Government-approved subcontracting; a contractor so disqualified is "suspended."

#### 9.404 Consolidated List of Debarred, Suspended, and Ineligible Contractors.

(a) The General Services Administration (GSA) shall—

(1) Compile and maintain a current, consolidated list of all contractors debarred, suspended, or declared ineligible by agencies or by the General Accounting Office;

(2) Revise and distribute the list quarterly and issue monthly supplements to all agencies and the General Accounting Office; and

(3) Provide with the list the name and telephone number of the official responsible for its maintenance and distribution.

(b) The consolidated list shall indicate—

(1) The names and addresses of all debarred, suspended, or ineligible contractors, in alphabetical order, with cross-references when more than one name is involved in a single action;

(2) The name of the agency or other authority taking the action;

(3) The cause for the action (see 9.406-2 and 9.407-2 for causes authorized under this subpart) or other statutory or regulatory authority;

(4) The scope of the action;

(5) The termination date for each listing; and

(6) The name and telephone number of the point of contact for the action.

(c) Each agency shall—

(1) Notify GSA of the information required by paragraph (b) above within 5 working days after the action becomes effective;

(2) Notify GSA within 5 working days after modifying or rescinding an action;

(3) Notify GSA of the names and addresses of agency organizations that are to receive the consolidated list and the number of copies to be furnished to each;

## 9.405

(4) In accordance with internal retention procedures, maintain records relating to each suspension or debarment action taken by the agency;

(5) Establish procedures to provide for the effective use of the list, to ensure that the agency does not solicit offers from, award contracts to, or consent to subcontracts with listed contractors, except as otherwise provided in this subpart; and

(6) Direct inquiries concerning listed contractors to the agency or other authority that took the action.

**9.405 Effect of listing.**

(a) Debarred or suspended contractors are excluded from receiving contracts, and agencies shall not solicit offers from, award contracts to, or consent to subcontracts with these contractors, unless the acquiring agency's head or a designee determines that there is a compelling reason for such action (see 9.405-2, 9.406-1(c), and 9.407-1(d)). Debarred or suspended contractors are also excluded from conducting business with the Government as agents or representatives of other contractors.

(b) Contractors listed as having been declared ineligible on the basis of statutory or other regulatory procedures are excluded from receiving contracts and, if applicable, subcontracts, under the conditions and for the period set forth in the statute or regulation. Agencies shall not solicit offers from, award contracts to, or consent to subcontracts with these contractors under those conditions and for that period.

**9.405-1 Continuation of current contracts.**

(a) Notwithstanding the debarment or suspension of a contractor, agencies may continue contracts or subcontracts in existence at the time the contractor was debarred or suspended, unless the acquiring agency's head or a designee directs otherwise. A decision as to the type of termination action, if any, to be taken should be made only after review by agency contracting and technical personnel and by counsel to ensure the propriety of the proposed action.

(b) Agencies shall not renew current contracts or subcontracts of debarred or suspended contractors, or otherwise extend their duration, unless the acquiring agency's head or a designee states in writing the compelling reasons for renewal or extension.

**9.405-2 Restrictions on subcontracting.**

When a debarred or suspended contractor is proposed as a subcontractor for any subcontract subject to Government consent, approval shall not be given unless the acquiring agency's head or a designee states in writing the compelling reasons for this approval.

**9.406 Debarment.****9.406-1 General.**

(a) The debarring official may, in the public interest, debar a contractor for any of the causes in 9.406-2, using the procedures in 9.406-3. The existence of a cause for debarment, however, does not necessarily require that the contractor be debarred; the seriousness of the contractor's acts or omissions and any mitigating factors should be considered in making any debarment decision. In this connection, the supplying of informa-

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tion by the contractor to the Government pursuant to the Anti-Kickback Act of 1986 (see 3.502) shall be favorable evidence of the contractor's responsibility.

(b) Debarment constitutes debarment of all divisions or other organizational elements of the contractor, unless the debarment decision is limited by its terms to specific divisions, organizational elements, or commodities. The debarring official may extend the debarment decision to include any affiliates of the contractor if they are (1) specifically named and (2) given written notice of the proposed debarment and an opportunity to respond (see 9.406-3(c)).

(c) A contractor's debarment shall be effective throughout the executive branch of the Government, unless an acquiring agency's head or a designee states in writing the compelling reasons justifying continued business dealings between that agency and the contractor.

**9.406-2 Causes for debarment.**

The debarring official may debar a contractor for any of the causes listed in paragraphs (a) through (c) following:

(a) Conviction of or civil judgment for—

(1) Commission of fraud or a criminal offense in connection with (i) obtaining, (ii) attempting to obtain, or (iii) performing a public contract or subcontract;

(2) Violation of Federal or State antitrust statutes relating to the submission of offers;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property; or

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.

(b) Violation of the terms of a Government contract or subcontract so serious as to justify debarment, such as—

(1) Willful failure to perform in accordance with the terms of one or more contracts; or

(2) A history of failure to perform, or of unsatisfactory performance of, one or more contracts.

(c) Any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor.

**9.406-3 Procedures.**

(a) *Investigation and referral.* Agencies shall establish procedures for the prompt reporting, investigation, and referral to the debarring official of matters appropriate for that official's consideration.

(b) *Decisionmaking process.* (1) Agencies shall establish procedures governing the debarment decisionmaking process that are as informal as is practicable, consistent with principles of fundamental fairness. These procedures shall afford the contractor (and any specifically named affiliates) an opportunity to submit, in person, in writing, or through a representative, infor-



mation and argument in opposition to the proposed debarment.

(2) In actions not based upon a conviction or judgment, if it is found that the contractor's submission in opposition raises a genuine dispute over facts material to the proposed debarment, agencies shall also—

(i) Afford the contractor an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents; and

(ii) Make a transcribed record of the proceedings and make it available at cost to the contractor upon request, unless the contractor and the agency, by mutual agreement, waive the requirement for a transcript.

(c) *Notice of proposal to debar.* Debarment shall be initiated by advising the contractor and any specifically named affiliates, by certified mail, return receipt requested—

(1) That debarment is being considered;

(2) Of the reasons for the proposed debarment in terms sufficient to put the contractor on notice of the conduct or transaction(s) upon which it is based;

(3) Of the cause(s) relied upon under 9.406-2 for proposing debarment;

(4) That, within 30 days after receipt of the notice, the contractor may submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment, including any additional specific information that raises a genuine dispute over the material facts;

(5) Of the agency's procedures governing debarment decisionmaking;

(6) Of the potential effect of the proposed debarment; and,

(7) If no suspension is in effect, that the agency will not solicit offers from, award contracts to, renew or otherwise extend contracts with, or consent to subcontracts with the contractor pending a debarment decision.

(d) *Debarring official's decision.* (1) In actions based upon a conviction or judgment, or in which there is no genuine dispute over material facts, the debarring official shall make a decision on the basis of all the information in the administrative record, including any submission made by the contractor. If no suspension is in effect, the decision shall be made within 30 working days after receipt of any information and argument submitted by the contractor, unless the debarring official extends this period for good cause.

(2) (i) In actions in which additional proceedings are necessary as to disputed material facts, written findings of fact shall be prepared. The debarring official shall base the decision on the facts as found, together with any information and argument submitted by the contractor and any other information in the administrative record.

(ii) The debarring official may refer matters involving disputed material facts to another official for findings of fact. The debarring official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

(iii) The debarring official's decision shall be made after the conclusion of the proceedings with respect to disputed facts.

(3) In any action in which the proposed debarment is not based upon a conviction or civil judgment, the cause for debarment must be established by a preponderance of the evidence.

(e) *Notice of debarring official's decision.* (1) If the debarring official decides to impose debarment, the contractor and any affiliates involved shall be given prompt notice by certified mail, return receipt requested—

(i) Referring to the notice of proposed debarment;

(ii) Specifying the reasons for debarment;

(iii) Stating the period of debarment, including effective dates; and

(iv) Advising that the debarment is effective throughout the executive branch of the Government unless the head of an acquiring agency or a designee makes the statement called for by 9.406-1(c).

(2) If debarment is not imposed, the debarring official shall promptly notify the contractor and any affiliates involved, by certified mail, return receipt requested.

#### 9.406-4 Period of debarment.

(a) Debarment shall be for a period commensurate with the seriousness of the cause(s). Generally, a debarment should not exceed 3 years. If suspension precedes a debarment, the suspension period shall be considered in determining the debarment period.

(b) The debarring official may extend the debarment for an additional period, if that official determines that an extension is necessary to protect the Government's interest. However, a debarment may not be extended solely on the basis of the facts and circumstances upon which the initial debarment action was based. If debarment for an additional period is determined to be necessary, the procedures of 9.406-3 above shall be followed to extend the debarment.

(c) The debarring official may reduce the period or extent of debarment, upon the contractor's request, supported by documentation, for reasons such as—

(1) Newly discovered material evidence;

(2) Reversal of the conviction or judgment upon which the debarment was based;

(3) Bona fide change in ownership or management;

(4) Elimination of other causes for which the debarment was imposed; or

(5) Other reasons the debarring official deems appropriate.

#### 9.406-5 Scope of debarment.

(a) The fraudulent, criminal, or other seriously improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with a contractor may be imputed to the contractor when the conduct occurred in connection with the individual's performance of duties for or on behalf of the contractor, or with the contractor's knowledge, approval, or acquiescence. The contractor's acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

(b) The fraudulent, criminal, or other seriously improper conduct of a contractor may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the contractor who participated in, knew of, or had reason to know of the contractor's conduct.

(c) The fraudulent, criminal, or other seriously improper conduct of one contractor participating in a joint venture or similar arrangement may be imputed to other participating contractors if the conduct occurred for or on behalf of the joint venture or similar arrangement, or with the knowledge, approval, or acquiescence of these contractors. Acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

#### 9.407 Suspension.

##### 9.407-1 General.

(a) The suspending official may, in the public interest, suspend a contractor for any of the causes in 9.407-2, using the procedures in 9.407-3.

(b) Suspension is a serious action to be imposed on the basis of adequate evidence, pending the completion of investigation or legal proceedings, when it has been determined that immediate action is necessary to protect the Government's interest. In assessing the adequacy of the evidence, agencies should consider how much information is available, how credible it is given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result. This assessment should include an examination of basic documents such as contracts, inspection reports, and correspondence.

(c) Suspension constitutes suspension of all divisions or other organizational elements of the contractor, unless the suspension decision is limited by its terms to specific divisions, organizational elements, or commodities. The suspending official may extend the suspension decision to include any affiliates of the contractor if they are (1) specifically named and (2) given written notice of the suspension and an opportunity to respond (see 9.407-3(c)).

(d) A contractor's suspension shall be effective throughout the executive branch of the Government, unless an acquiring agency's head or a designee states

in writing the compelling reasons justifying continued business dealings between that agency and the contractor.

#### 9.407-2 Causes for suspension.

(a) The suspending official may suspend a contractor suspected, upon adequate evidence, of—

(1) Commission of fraud or a criminal offense in connection with (i) obtaining, (ii) attempting to obtain, or (iii) performing a public contract or sub-contract;

(2) Violation of Federal or State antitrust statutes relating to the submission of offers;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property; or

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.

(b) Indictment for any of the causes in paragraph (a) above constitutes adequate evidence for suspension.

(c) The suspending official may upon adequate evidence also suspend a contractor for any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor.

#### 9.407-3 Procedures.

(a) *Investigation and referral.* Agencies shall establish procedures for the prompt reporting, investigation, and referral to the suspending official of matters appropriate for that official's consideration.

(b) *Decisionmaking process.* (1) Agencies shall establish procedures governing the suspension decisionmaking process that are as informal as is practicable, consistent with principles of fundamental fairness. These procedures shall afford the contractor (and any specifically named affiliates) an opportunity, following the imposition of suspension, to submit, in person, in writing, or through a representative, information and argument in opposition to the suspension.

(2) In actions not based on an indictment, if it is found that the contractor's submission in opposition raises a genuine dispute over facts material to the suspension and if no determination has been made, on the basis of Department of Justice advice, that substantial interests of the Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced, agencies shall also—

(i) Afford the contractor an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents; and

(ii) Make a transcribed record of the proceedings and make it available at cost to the contractor upon request, unless the contractor and the

agency, by mutual agreement, waive the requirement for a transcript.

(c) *Notice of suspension.* When a contractor and any specifically named affiliates are suspended, they shall be immediately advised by certified mail, return receipt requested—

(1) That they have been suspended and that the suspension is based on an indictment or other adequate evidence that the contractor has committed irregularities (i) of a serious nature in business dealings with the Government or (ii) seriously reflecting on the propriety of further Government dealings with the contractor—any such irregularities shall be described in terms sufficient to place the contractor on notice without disclosing the Government's evidence;

(2) That the suspension is for a temporary period pending the completion of an investigation and such legal proceedings as may ensue;

(3) Of the cause(s) relied upon under 9.407-2 for imposing suspension;

(4) Of the effect of the suspension;

(5) That, within 30 days after receipt of the notice, the contractor may submit, in person, in writing, or through a representative, information and argument in opposition to the suspension, including any additional specific information that raises a genuine dispute over the material facts; and

(6) That additional proceedings to determine disputed material facts will be conducted unless (i) the action is based on an indictment or (ii) a determination is made, on the basis of Department of Justice advice, that the substantial interests of the Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced.

(d) *Suspending official's decision.* (1) In actions (i) based on an indictment, (ii) in which the contractor's submission does not raise a genuine dispute over material facts, or (iii) in which additional proceedings to determine disputed material facts have been denied on the basis of Department of Justice advice, the suspending official's decision shall be based on all the information in the administrative record, including any submission made by the contractor.

(2) (i) In actions in which additional proceedings are necessary as to disputed material facts, written findings of fact shall be prepared. The suspending official shall base the decision on the facts as found, together with any information and argument submitted by the contractor and any other information in the administrative record.

(ii) The suspending official may refer matters involving disputed material facts to another official for findings of fact. The suspending official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

(iii) The suspending official's decision shall be made after the conclusion of the proceedings with respect to disputed facts.

(3) The suspending official may modify or terminate the suspension or leave it in force (for example, see 9.406-4(c) for the reasons for reducing the period or extent of debarment). However, a decision to modify or terminate the suspension shall be without prejudice to the subsequent imposition of (i) suspension by any other agency or (ii) debarment by any agency.

(4) Prompt written notice of the suspending official's decision shall be sent to the contractor and any affiliates involved, by certified mail, return receipt requested.

#### 9.407-4 Period of suspension.

(a) Suspension shall be for a temporary period pending the completion of investigation and any ensuing legal proceedings, unless sooner terminated by the suspending official or as provided in this subsection.

(b) If legal proceedings are not initiated within 12 months after the date of the suspension notice, the suspension shall be terminated unless an Assistant Attorney General requests its extension, in which case it may be extended for an additional 6 months. In no event may a suspension extend beyond 18 months, unless legal proceedings have been initiated within that period.

(c) The suspending official shall notify the Department of Justice of the proposed termination of the suspension, at least 30 days before the 12-month period expires, to give that Department an opportunity to request an extension.

#### 9.407-5 Scope of suspension.

The scope of suspension shall be the same as that for debarment (see 9.406-5), except that the procedures of 9.407-3 shall be used in imposing suspension.

### SUBPART 9.5—ORGANIZATIONAL CONFLICTS OF INTEREST

#### 9.500 Scope of subpart.

This subpart prescribes responsibilities, general rules, and procedures for identifying, evaluating, and resolving organizational conflicts of interest. It also provides examples to assist contracting officers in applying these rules and procedures to individual contracting situations.

#### 9.501 Definition.

An "organizational conflict of interest" exists when the nature of the work to be performed under a proposed Government contract may, without some restriction on future activities, (a) result in an unfair competitive advantage to the contractor or (b) impair the contractor's objectivity in performing the contract work.

**PART 9--CONTRACTOR QUALIFICATIONS**  
**SUBPART 9.1--RESPONSIBLE PROSPECTIVE CONTRACTORS**

**9.103 Policy.**

(70) Acquisition from Concerns in Qualifying Countries.

(1) Awards to concerns in qualifying countries are subject to this subpart and other sections of this Supplement concerning NATO participating country sources.

(2) A Canadian firm proposed by the Canadian Commercial Corporation (CCC) as its subcontractor generally shall be accepted by the contracting officer under the provisions of FAR 9.104-4 as the basis for his determination under FAR 9.103.

**9.104 Standards.****9.104-3 Application of Standards.**

(c) Satisfactory Performance Record.

(c)(2) Quality is a significant consideration in determining satisfactory performance. Quality defects of a critical or repetitive nature without adequate and timely corrective action, including repair or replacement of items, shall also be presumptive of inability to meet this requirement. DoD components shall assure that contracts are not awarded to contractors with a history of providing supplies or services of an unsatisfactory quality.

(70) In cases where the firm proposed by CCC is so accepted, pre-award survey forms need not be completed. When the CCC proposal is not consistent with other information which may be available to the contracting officer, the contracting officer shall request from CCC and any other sources whatever additional information or plant surveys the contracting officer may deem necessary to make the determination of responsibility of sources proposed by CCC. Such additional data may be requested on the preaward survey forms or on any other forms. Upon request, CCC shall be furnished an explanation of the reasons for rejection of its proposed firm.

**9.105 Procedures.****9.105-70 Current Information.**

(a) Maximum practicable use shall be made of currently valid information on file or within the knowledge of personnel in the Department of Defense. Each Department, shall at such level and manner as it deems appropriate, maintain useful records and experience data for the guidance of contracting officers in the placement of new procurement, and shall inform its contracting officers and the other Departments of the means of access thereto. Notwithstanding this direction contract administration offices shall maintain files of

information reflecting upon the ability of contractors to perform Government contracts successfully.

(b) For preaward survey assistance for contracts requiring performance of Contract Administration Services (CAS) on military installations, see 42.270.

#### **9.106 Preaward Surveys.**

##### **9.106-2 Requests for Preaward Surveys.**

(70) Procedure for Requesting Preaward Survey.

(1) Preaward surveys will be accomplished by the cognizant Contract Administration Office as listed in DoD Directory of Contract Administration Services Components, DoD 4105.59-H. The contracting officer shall request a preaward survey on Standard Form (SF) 1403, Preaward Survey of Prospective Contractor (General), indicating in Section III thereof, the scope of the survey desired. An original and 3 copies of the SF 1403 requesting a preaward survey will be provided along with a copy of the solicitation and such drawings and specifications as deemed necessary by the purchasing office.

(2) Factors requiring emphasis not enumerated in Section III should be listed by the contracting officer under item "G" of that Section and explained in block 23, Remarks.

(3) The "Walsh-Healey Public Contracts Act" block of Section I is for information purposes only. If information is needed on the offeror's eligibility under the Walsh-Healey Act, it must be specifically requested in block "G" of Section III and explained in block 23, Remarks.

(4) A survey may be requested by telegraphic communication containing the data required by Sections I, II, and III of the form. A survey may be requested by telephone but shall be immediately confirmed by transmittal of completed SF 1403.

(5) The SF 1403 lists five major factors and seven other factors to be evaluated. One or more of these factors can be checked depending on the contracting officer's concerns regarding the offeror's responsibility. Following is a brief explanation of the factors:

#### SECTION III, Block 19, MAJOR FACTORS

FACTOR A - Technical Capability - An assessment of the prospective contractor's key management personnel to determine if they have the basic technical knowledge, experience, and understanding of the requirements necessary to produce the required product or provide the required service.

FACTOR B - Production Capability - An evaluation of the prospective contractor's ability to plan, control, and integrate manpower, facilities, and other resources necessary for successful contract completion. This includes (1) an assessment of the prospective contractor's possession of, or the ability to acquire, the necessary facilities, material, equipment and labor; (2) a determination that the prospective contractor's system provides for timely placement of orders and for vendor follow-up and control.

FACTOR C - Quality Assurance Capability - An assessment of the prospective contractor's capability to comply with the quality assurance requirements of the proposed contract. It may involve an evaluation of the prospective contractor's quality assurance system, personnel, facilities and equipment.

FACTOR D - Financial Capability - A determination that the prospective contractor has adequate financial resources, or access to them, to acquire needed facilities, equipment, materials, etc.

FACTOR E - Accounting System - An assessment by the Defense Contract Audit Agency (DCAA) of the adequacy of the prospective contractor's accounting system. Normally, an accounting system review will be requested when conditions such as progress payment, or a cost or incentive type contract is contemplated.

### SECTION III, Block 20, OTHER FACTORS

FACTOR A - Government Property Control - An assessment of the prospective contractor's capability to manage and control Government property.

FACTOR B - Transportation - An assessment of the prospective contractor's capability to comply with the laws and regulations applicable to the movement of Government material, or overweight, oversized, hazardous cargo, etc.

FACTOR C - Packaging - An assessment of the prospective contractor's ability to meet all contractual packaging requirements including preservation, unit pack, packing, marking and unitizing for shipment.

FACTOR D - Security Clearance - A determination that the prospective contractor's facility security clearance is adequate and current. (When checked, this factor will be referred to the Defense Investigation Service (DIS) by the surveying activity.)

FACTOR E - Plant Safety - An assessment of the prospective contractor's ability to comply with safety requirements specified in the solicitation.

FACTOR F - Environmental/Energy Considerations - An evaluation of the prospective contractor's ability to meet specific environmental/energy requirements contained in the solicitation.

FACTOR G - Other - This factor is checked when an assessment of other than Major Factors A-E and Other Factors A-F is desired. When Factor G is checked, the desired information will be explained in the Remarks sections. An example of an item that may be included under this factor is Walsh-Healey eligibility.

(6) Factors checked on the SF 1403 will be limited to those essential to the contracting officer's determination of responsibility.

(7) Block 10 of the SF 1403 will show the date preaward survey results are required by the purchasing office. This date will be determined by the contracting officer after due consideration of the urgency of the acquisition, and the scope and complexity of the preaward survey. In particular, consideration must be given to the more time-consuming aspects of a preaward survey such as secondary survey requirements, accounting system review, financial capability analysis, and purchasing office participation in the survey. Routine preaward surveys, with established DoD contractors, are normally accomplished by the Contract Administration Office within 7 workdays after receipt of the request. Preaward survey requests for particularly complex items, or those involving aspects as mentioned above, will usually require more time and should be allowed for by the contracting officer.

**9.106-70 Steps for Survey Performance.** The three steps in performing a preaward survey are the preliminary analysis, the development and evaluation of information, and the preparation and review of the survey report.

(a) Preliminary Analysis. The request (SF 1403, Sections I, II, and III) shall be reviewed to establish basic administrative information and the factors to be evaluated. The solicitation shall then be reviewed to ascertain those general and special requirements which have a significant bearing on determining contractor responsibility. Examples are the nature of the product, applicable specifications, delivery schedule, documentation requirements, property control requirements, and financing aspects.

(b) Development of Information.

(1) Review of Available Data. The information already available in the contract administration office pertaining to the prospective contractor and his past performance shall be reviewed. Prior preaward survey reports shall be examined and considered in support of preaward survey recommendations. If the prospective contractor has current or contemplated Government contracts, the files should be checked for information regarding similarity of product, current status of contracts, quality control experience, and financial status.

(2) Development of Additional Data.

(i) When appropriate, the contract administration office shall supplement the data on hand with any additional information required from other Government sources and from commercial sources, such as banks, business associates, and credit rating and reporting agencies.

(ii) When a prospective contractor proposes to acquire additional resources essential to performance of the proposed contract, the CAO shall as a minimum obtain and evaluate:

- (A) an itemized list of the required resources;
- (B) a planned method of acquisition; and
- (C) a schedule for acquisition of resources.

Failure to meet commitments on previous contracts shall be documented in the current preaward survey report and considered in the final recommendation.

(c) On-Site Surveys.(1) Interview, Evaluation, and Review.

(i) General. An on-site survey will consist of an interview with representatives of the prospective contractor and, normally, an evaluation of his resources and procedures.

(ii) Interview with Management. Management officials of the appropriate level authorized to represent the prospective contractor should be interviewed. The prospective contractor's background shall be reviewed and as much history recorded as necessary to reflect the soundness and reputation of the firm's operation.

(A) The organizational structure of the facility is the basis for management's control and must be reviewed. Assignment of definite tasks and responsibilities should be checked.

(B) Lack of understanding or misinterpretation of the solicitation often results in delinquent contracts and leads to default actions. Therefore, the solicitation shall be discussed with prospective contractors to assure that they understand its requirements, including its technical aspects such as drawings, specifications, prototype, technical data and provisioning technical documentation (including automated data processing requirements when appropriate), testing, packaging, and Government's right to use technical data in accordance with the terms of the solicitation. Any



misinterpretations of the requirements of the solicitation which could adversely affect performance, or refusal by the prospective contractor to furnish required data, should be brought to the immediate attention of the official approving the survey by the team coordinator. The official approving the survey shall, in turn, promptly advise the purchasing office.

(iii) Evaluation of Resources and Review of Procedures. The resources which the prospective contractor intends to utilize shall be inspected, analyzed, and compared with his overall plans for performing. His procedures relating to performance of the proposed contract shall be reviewed for adequacy.

(iv) Specific Factors to be Considered. In the course of developing information, those factors described in 9.106-70(c)(2) through 9.106-70(c)(4) below and all others needed to provide the report and recommendations in the detail and to the extent required by the purchasing office shall be considered.

(2) Production.

(i) General. The production portion of the on-site survey consists of an evaluation of the prospective contractor's ability to manufacture the product(s) in accordance with the specifications and delivery schedule of the proposed contract. To achieve the objectives of this portion of the on-site survey, the production plan shall be reviewed, production resources ascertained, and the plan related to such resources.

(ii) Obtaining the Production Plan. The prospective contractor's production plan for meeting the delivery schedule specified in the proposed contract shall be ascertained. The principal milestones within the production plan shall be established, along with target dates for achievement. These target dates must support the delivery schedule of the proposed contract. The controls which will be utilized in order to gear and hold the manufacturing effort to the target dates for the principal milestones shall be analyzed for suitability.

(iii) Ascertaining Production Resources. The information necessary to prepare SF 1405 shall be obtained by discussion with appropriate management personnel of the prospective contractor. This information shall be verified, when necessary, by physical inspection of the manufacturing plant and evaluated in terms of suitability to manufacture the required item(s).

(iv) Relating Production Plans to Production Resources. When necessary, representatives of the prospective contractor shall be requested to advise how the production resources will be allocated and utilized in order to achieve the target dates for the principal milestones. This shall include both in-house and subcontractor production resources. Pertinent to this is an analysis of projects

and contracts which will compete for utilization of those resources within the same time frame as that specified by the prospective contractor's production plan. The information developed as a result of equating the production plan and production resources of the prospective contractor should enable the contract administration office to:

(A) conclude whether the resources which the prospective contractor is planning to use are suitable for the job;

(B) determine whether the prospective contractor will be capable of properly controlling, maintaining, protecting and using Government property;

(C) determine whether the planning and scheduling of effort will result in timely accomplishment of the principal milestones;

(D) conclude whether achievement of the principal milestones will result in timely delivery.

(3) Quality Assurance (SF 1406).

(i) The standing of the quality assurance organization in the prospective contractor's overall organization must be evaluated. An inspection or quality control function which reports to some other organizational segment (such as Production) instead of top management may be undesirable. The experience of the company inspection or quality control personnel with the same or similar items shall be evaluated.

(ii) To evaluate the prospective contractor's ability to comply with quality control or inspection requirements, the following areas shall be reviewed:

(A) methods currently utilized to control product quality as reflected by a documented or verifiable inspection system or quality program plan;

(B) personnel on hand and available (report both trained and untrained);

(C) inspection and test equipment on hand and available;

(D) quality, identification, and storage of materials;

(E) physical arrangement of plant;

(F) tool and gauge control; and

(G) test and inspection records.

(4) Financial (SF 1407).

(i) General. The normal procedure for determining a prospective contractor's financial capability shall be initial presurvey planning, followed by verification of financial data as required. The extent of the review and analysis of financial matters shall be governed by the nature of the proposed contract. In certain instances, a sound decision may be possible after a relatively simple review of a company's financial position and production commitments. Under other circumstances, a more comprehensive review and analysis will be required. The approach to financial analysis shall be consistent with

the basic policies and regulations outlines in FAR 32.172, 32.173 and 32.174.

(ii) Procedure. Aspects to be considered in determining the prospective contractor's financial capability include the following:

(A) The latest balance sheet and profit and loss statement shall be reviewed. The following are indicative of the soundness of the prospective contractor's financial structure:

1. rates and ratios;
2. working capital as represented by current assets over current liabilities; and
3. financial trends such as net worth, sales and profit.

(B) The method of financing the contract shall be evaluated. Where sources of outside financing, other than the Government, are indicated, their availability should be verified.

(C) When financial aid from the Government is to be obtained, the necessity should be verified. Review shall be made concerning the applicability of such financing as progress payments or guaranteed loans.

(d) Evaluating Data and Preparing the Report.

(1) Findings of Team Members. When the required information has been gathered, each individual participant shall analyze it and evaluate the prospective contractor's capability to perform with respect to the functional element(s) evaluated. Each participant shall then provide his findings to the official approving the survey. When a negative reply is recorded, or when doubt exists, an explanation must substantiate such action. If a detailed analysis is needed or additional significant information is pertinent, a narrative report shall be supplied.

(2) Evaluation and Recommendation. Based on all the information received from the team members, the official approving the survey shall thoroughly review and evaluate the findings and recommendations, and forward the report direct to the purchasing office. When advance reports are made by telegraphic communication or telephone, they shall be confirmed by mail without delay. The official approving the survey shall follow up on any requirements for the submission of supplemental reports.

#### **9.106-71 Audit Responsibilities for Preaward Surveys and Reviews.**

Preaward surveys of potential contractors' competence to perform proposed contracts shall be managed and conducted by the contract administration office. When information is required on the adequacy of the contractor's accounting system or its suitability for administration of the proposed type of contract, such information shall always be obtained by the ACO from the auditor. The contract administration office shall be responsible for advising the contracting officer on matters concerning the contractor's financial competence or credit needs.

**9.170 Acquisition from Firms Owned or Controlled by Foreign Governments that Support Terrorism.**

**9.170-1 Definition.**

"Significant interest" as used in this section means--

- (a) Ownership of or beneficial interest in five percent or more of the firm's or subsidiary's securities. Beneficial interest includes holding five percent or more of any class of the firm's securities in "nominee shares", "street names", or some other method of holding securities that does not disclose the beneficial owner;
- (b) Holding a management position in the firm such as a director or officer;
- (c) Ability to control or influence the election, appointment, or tenure of directors or officers in the firm;
- (d) Ownership of 10 percent or more of the assets of a firm such as equipment, buildings, real estate, or other tangible assets of the firm; or
- (e) Holding 50 percent or more of the indebtedness of a firm.

**9.170-2 Disclosure.** 10 U.S.C. 2327 requires that, for contracts expected to equal or exceed \$100,000, Department of Defense agencies obtain from any firm, or subsidiary of a firm, submitting a bid or proposal, a disclosure in that bid or proposal of any significant interest in such firm or subsidiary (or, in the case of a subsidiary, in the firm that owns the subsidiary) which is owned or controlled, directly or indirectly, by a foreign government or an agent or instrumentality of a foreign government, if such foreign government is the government of a country that has been determined by the Secretary of State under 50 U.S.C. 2405(j)(1)(A) to have repeatedly provided support for acts of international terrorism.

**9.170-3 Prohibition.** 10 U.S.C. 2327(b) prohibits a Defense agency from awarding a contract of \$100,000 or more to a firm or a subsidiary of a firm in which a foreign government owns or controls a significant interest, directly or indirectly, in such firm or subsidiary (or, in the case of a subsidiary, in the firm that owns the subsidiary), if such foreign government is the government of a country that has been determined by the Secretary of State under U.S.C. 2405(j)(1)(A) to have repeatedly provided support for acts of international terrorism. The Secretary of Defense may waive this prohibition in accordance with 10 U.S.C. 2327(c).

**9.170-4 Solicitation Provision.** The contracting officer shall insert the provision at 52.209-7000, Certification or Disclosure of Ownership or Control by a Foreign Government that Supports Terrorism, in solicitations when the contract is expected to equal or exceed \$100,000.

**PART 9 -- CONTRACTOR QUALIFICATIONS**  
**SUBPART 9.4 - DEBARMENT, SUSPENSION AND INELIGIBILITY**

**9.404 Consolidated List of Debarred, Suspended, and Ineligible Contractors.**

(c)(4) The Assistant Judge Advocate General for Military Law is the authorized representative of the Secretary and as such is responsible for establishment and maintenance of records of contractors debarred or suspended by the Department of the Army. The Chief, Contract Fraud Branch, Litigation Division, OTJAG, shall maintain such records on his behalf.

**9.405-1 Continuation of Current Contracts.**

(a) Administration of current contracts with contractors who have been debarred or suspended, or whose debarment has been proposed by any DOD component (hereinafter "listed contractors"), may be continued unless otherwise directed by the Head of Contracting Activity or the Assistant Judge Advocate General for Military Law. Settlement of terminated contracts with such contractors may similarly be continued unless otherwise directed. A contracting officer's exercise of contractual, regulatory, statutory, common law and other rights in connection with administration or settlement of current contracts is not affected by the debarment, suspension, or proposed debarment of a contractor, except that existing contracts may not be renewed or otherwise extended unless an exception is required and granted in accordance with 9.406-1(90) below.

(b) Authorization for novation of contracts held by listed contractors shall not be granted without the approval of the Head of Contracting Activity.

**9.406 Debarment.**

**9.406-1 General.**

(90) If the acquiring activity believes that a compelling reason exists to continue to do business with a contractor who has been debarred, suspended, or proposed for debarment, it shall submit a request for a determination with a detailed justification therefor through channels to the Head of Contracting Activity. If the Head of Contracting Activity concurs, the request and concurrence shall be forwarded to the Assistant Judge Advocate General for Military Law.

**9.472-2 Contents of Reports.** In addition to the information required by DOD FAR Supplement 9.472-2 reports shall include:

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## 9.4-2

(a) The name of the investigative agency that investigated either the facts reflected in the report or other aspects of the contractor's dealings with the Government.

(b) Credit and Financial reports on the contractor which are available, such as those produced by Dun & Bradstreet, Inc.

The recommendations required by DOD FAR Supplement 9.472-2(i) and (k) shall be based upon facts included in the report and upon the application of the causes set forth in the FAR to those facts. Such causes shall be specifically cited. Recommendations of suspension or debarment based upon affiliation (see FAR 9.406-1(b)) or imputation (see FAR 9.406-5) shall be supported by evidence of the elements necessary to establish affiliation or imputation.

**9.472-3 Addressees and Copies of Reports.**

(a) When all of the information required by DOD FAR Supplement 9.472-2 is not immediately available, the contracting officer shall prepare the report and forward it with the information at hand. The initial report shall explain the absence of the required information. Such information, along with updated or additional data, shall be promptly forwarded as it becomes available.

(b) One copy of each report shall be sent directly to the Chief, Contract Fraud Branch, Litigation Division, OTJAG. The original and remaining copy shall be forwarded through contracting channels to the Contract Fraud Branch, and shall contain the recommendations of each successive echelon, including the Head of Contracting Activity.

(c) Reports required by DOD FAR Supplement 9.472-2 are exempt from reports control under paragraph 7-2t, AR 335-15.

**9.490 Fraud or Criminal Conduct.**

(a) Prompt reporting is essential in all cases of alleged fraud or other criminal conduct in connection with contracting activities and of all other irregularities which could lead to debarment or suspension of a contractor or to judicial or administrative action against military personnel or civilian employees of the Department of the Army. When the report pertains to military personnel or civilian employees, the content of the report set forth in DOD FAR Supplement 9.472-2 shall be modified as appropriate. Notification to the Federal Bureau of Investigation pursuant to AR 27-10, submission of a serious incident report pursuant to AR 190-40, or submission of a litigation report pursuant to AR 27-40 does not eliminate the reporting requirement in DOD FAR Supplement 9.472-2.

(b) Within the Department of the Army the requirement for reporting under DOD FAR Supplement 9.472-1(a), (b), (c), (d),

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(e), and (f) is based upon the existence of reason to suspect that one or more of the enumerated offenses or acts has been committed. This is a lesser standard than, and not necessarily related to, the standard used by the suspending official under FAR 9.407-2 in determining whether to suspend. For example, if there is sufficient information to warrant an inquiry into such matters by a contracting officer, auditor, inspector, or criminal investigator, there exists sufficient suspicion to make an initial report (see 9.472-3(a)).

(c) The legal advisor to the contracting officer and the Advisor on Fraud Matters to the Assistant Secretary of the Army (Research, Development and Acquisition) (see 9.491(b)) shall review each report to determine the adequacy of the investigation.

(d) When allegations of fraud or criminal conduct in connection with contracting activities are reported, the reporting agency shall determine whether a review should also be made of other contractual relationships with the contractor and its affiliates. The review, if made, shall cover a period of at least two years, or longer if considered necessary, to determine whether there is contract fraud or criminal conduct involved in other contracts and whether the Government may have any basis for recovery of damages or payments from the contractor. If any further fraud or criminal conduct is discovered, an additional report under this section will be submitted.

(e) Reports recommending suspension based upon an indictment or debarment based upon a conviction shall be submitted immediately upon receipt of notice of the indictment or conviction. A copy of the indictment or judgment and probation/commitment order, as appropriate, shall be obtained and forwarded with the report or as soon as possible after the report is forwarded.

(f) When the report recommends suspension or debarment because of contractor fraud or criminal conduct involving a current contract, all funds becoming due the contractor on that contract shall be withheld unless directed otherwise by the Head of Contracting Activity or the Assistant Judge Advocate General for Military Law.

#### **9.491 Responsibilities.**

(a) The Judge Advocate General, Department of the Army, has primary responsibility for liaison with the Department of Justice. Officers and employees of the Department of the Army shall avoid unauthorized communications with the Department of Justice or with a United States Attorney concerning a matter reported or reportable pursuant to DOD FAR Supplement 9.472-1. This paragraph shall in no way affect the requirement of AR

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27-10 that certain offenses be reported to the Federal Bureau of Investigation, nor the requirement for cooperation with that Bureau during the course of its investigation.

(b) The Advisor on Fraud Matters to the Assistant Secretary of the Army (Research, Development and Acquisition) is responsible for, and has the authority necessary to, coordinate and monitor the Army's actions relating to fraud and criminal conduct in connection with contracting activities by contractors and their personnel and by military personnel or civilian employees of the Department of the Army. The Chief, Contract Fraud Branch, Litigation Division, OTJAG, is the Advisor on Fraud Matters to the Assistant Secretary of the Army (Research, Development and Acquisition).

**9.492 Delegation of Authority by Head of Contracting Activity.** A Head of Contracting Activity may delegate authority under this Part to his or her deputy or a principal assistant responsible for contracting or to his or her legal advisor.

**9.493 Debarment and Suspension Procedures.**

(a) Purpose. The purpose of these procedures is to ensure fair and uniform treatment of contractors suspended or proposed for debarment by the Army. These procedures supplement those established in Part 9, Subpart 9.4 of the Federal Acquisition Regulation (FAR).

(b) Notification. Contractors will be notified of suspension or proposed debarment in accordance with FAR 9.406-3(c) and 9.407-3(c). Contractors routinely will be furnished a copy of the entire record which formed the basis for the decision by the Assistant Judge Advocate General for Military Law (AJAG). If there is reason to withhold from the contractor any portion of that record, the contractor will be informed of what is withheld and the reasons for such withholding.

(c) Nature of Proceeding. There are two distinct proceedings which may be involved in the suspension or debarment process. The first is the presentation of matters in opposition to the suspension or proposed debarment by the contractor. The second is fact-finding, which occurs only in cases in which the contractor's presentation of matters in opposition raises a genuine dispute over material facts. In a suspension action based upon an indictment and in a proposed debarment action based upon a conviction, there is no regulatory right to a fact-finding proceeding, as the fact of the indictment or conviction is sufficient basis for the proposed action. To the extent that the proposed action stems from the contractor being an affiliate of the individual or firm indicted or convicted,



fact-finding is permitted, but only if a genuine dispute of fact is raised as to the question of affiliation.

(d) Presentation of Matters in Opposition.

(1) In accordance with FAR 9.406-3(c) and 9.407-3(c), matters in opposition may be presented in person, in writing, or through a representative. Matters in opposition may be presented through any combination of the foregoing methods, but if a contractor desires to present matters in person or through a representative, any written matters must be delivered at least five working days in advance of the oral presentation. With the exception of the foregoing, all matters in opposition must be presented in a single proceeding. Such a proceeding is non-adversarial in nature, although the AJAG or any person he designates may ask questions of the person or making or assisting in making the presentation. The presentation will be scheduled for a date which is within 10 working days of the date requested by the contractor. In accordance with FAR 9.406-3(c) and 9.407-3(c), the contractor has 30 days from receipt of the notice of suspension or proposed debarment to submit matters in opposition.

(2) A verbatim transcript of the oral presentation will be prepared. A copy will be made available to the contractor at his request.

(3) The opportunity to present matters in opposition to debarment includes the right to present matters concerning the duration of debarment.

(4) Within five working days following the submission of matters in opposition, the contractor may submit to AJAG a written statement outlining the material fact or facts, if any, believed to be in dispute.

(e) Fact-Finding.

(1) In cases in which fact-finding is authorized, AJAG will determine within 30 working days of the contractor's presentation of matters in opposition whether the presentation has raised a genuine dispute over one or more material facts. He will determine the material fact or facts, if any, as to which a genuine dispute has been raised. Upon determining such a dispute exists, he will appoint a military judge made available by the United States Army Trial Judiciary to conduct a fact-finding proceeding, unless such proceeding is unnecessary because AJAG has decided against debarment or continued suspension based upon the contractor's presentation of matters before him.

(2) The designated military judge will establish a date for a fact-finding hearing. This date will be within 45 working days of the date of the contractor's presentation of matters in opposition, unless the contractor requests a later date. The delayed hearing will occur within 60 working days of

the date of the contractor's presentation of matters in opposition.

(3) While formal rules of evidence do not apply in fact-finding proceedings, certain basic principles will be observed:

(A) The military judge, in advance of the proceeding, will receive from AJAG a description of the general nature of the case and the material fact or facts he has determined to be in dispute.

(B) The proceeding before the military judge is limited to a resolution of the fact or facts in dispute as determined by AJAG.

(C) The burden is on the government to establish the disputed fact or facts by a preponderance of the evidence.

(D) While no subpoena power exists to compel attendance of witnesses, Department of Defense employees whose testimony is critical to establishing the fact or facts in dispute will testify in person if they are employed in the area in which the fact-finding proceeding takes place and are otherwise available to testify. If such employees are not available to testify, their sworn statements may be used in lieu of their testimony and will be given appropriate weight by the military judge. The military judge's decision on the question of availability is final.

(E) Hearsay evidence may be used and will be given appropriate weight by the military judge.

(F) All witnesses, whether presented by the government or the contractor will be placed under oath and are subject to cross-examination.

(G) Administrative arrangements, costs, and fees for all witnesses, including Department of Defense employees, desired by the contractor are the contractor's sole responsibility. Permission for Department of Defense employees to appear and testify will not be unreasonably withheld.

(4) A verbatim transcript of the proceedings will be prepared. A copy will be made available to the contractor at his request.

(5) The military judge will prepare written findings of fact, limited to the fact or facts in dispute, and provide them along with a copy of the transcript to AJAG within 15 working days of the conclusion of the proceedings. A copy of the findings of fact will be provided to the contractor.

(6) AJAG will notify the contractor of debarment or continued suspension within 10 working days of receipt of the findings of fact. His decision will be based upon the entire administrative record.

(f) Time Requirements. All time requirements set forth in these procedures may be extended by AJAG, but only for good cause.

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